# Death Sentence *Habeas* Petition Denied

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## Missouri Supreme Court Finds the Opinion of a Treating Professional More Credible than an Evaluating Expert and Denies *Habeas* Petition

DOI:10.29158/JAAPL.240025-24

**Key words:** *habeas corpus*; death penalty; treating psychiatrist; expert witness

In *State ex re. Johnson v. Vandergriff,* 668 S.W. 3d 574 (Mo. 2023), the Missouri Supreme Court denied Johnny Johnson's *habeas* petition, finding that he did not meet the substantial threshold showing of insanity that is required.

### Facts of the Case

On July 26, 2003, in Valley Park, Missouri, Johnny A. Johnson lured 6-year-old Casey Williamson to an abandoned glass factory. At the factory, he attempted to sexually assault her. When she resisted, he struck her in the head at least six times with a brick, and eventually a boulder, until she ceased breathing. Afterward, he attempted to conceal the crime scene by washing the victim's blood and other evidence from his body in the nearby Meramec River. When questioned by law enforcement, he confessed. He was tried and convicted by a jury of first-degree murder, kidnapping, attempted forcible rape, and armed criminal action. He was sentenced by the trial court to death and three life sentences to be served consecutively. On direct appeal, the Supreme Court of Missouri affirmed his convictions and sentence. Mr. Johnson's postconviction relief appeal was also denied.

Following the Supreme Court of Missouri's affirmance of his convictions and sentence, and the issuing of a warrant for execution, Mr. Johnson filed a petition for a *writ* of *habeas corpus* claiming his execution would violate the Eighth and Fourteenth Amendments because he was he was severely mentally ill and incompetent to be executed under the standard set by *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986).

In support of his incompetency claims, Mr. Johnson presented a report from a psychiatrist, Dr. Bhushan Agharkar, who conducted an assessment and conducted a single clinical interview with Mr. Johnson. Dr. Agarkar concluded that Mr. Johnson was aware that he was on death row and he was convicted of murder, but that he did not have a rational understanding of the link between his crime and his pending execution. The expert based this conclusion on various delusional beliefs endorsed by Mr. Johnson, including the following: Satan was "using" the state of Missouri to execute him to bring about the end of the world, he was marked with the "Seventh Sign" and the world would be destroyed at his passing, he could enter the heads of the judge and lawyers and influence them, and the spirits of the underworld can influence the state to not execute him for Satan's purposes. The expert further concluded that while Mr. Johnson reported that he thinks he would die by lethal injection, he does not have a rational understanding of the finality of his punishment. This conclusion was based on Mr. Johnson's belief that he is a vampire and able to "reanimate" his organs and that he can enter an animal's mind if he can learn the right "code" to go on living after his execution.

In response, the state argued that while this expert opines that Mr. Johnson "does not have a rational understanding of the link between his crime and punishment" (*Johnson*, p 577), the expert also opined that Mr. Johnson is "aware that he is sentenced to death for the murder of a child and that the state plans to execute him via lethal injection" (*Johnson*, p 578). The state argued that his awareness of his crime and the subsequent punishment is evidence of Mr. Johnson's rational understanding. The defense countered this argument stating that "awareness" of the reason for his penalty is not the same as a rational understanding of the reason for his penalty, citing *Panetti*.

The state further challenged the credibility of the defense's expert psychiatrist, arguing that Mr. Johnson's medical records and an affidavit, dated May 24, 2023, from Ashley Skaggs, the institutional chief of mental health at Potosi Correctional Center, who met with

him regularly, do not support Mr. Johnson's report of auditory hallucinations and delusions. The medical records noted that his current medications were controlling his symptoms. Finally, during Ms. Skaggs' visits with Mr. Johnson, he made statements about his upcoming execution, his communications with his attorneys, and the status of his legal appeals. Within the affidavit, Ms. Skaggs concluded that Mr. Johnson appeared to understand the nature of his upcoming execution.

### Ruling and Reasoning

In a five to one decision, the court denied Mr. Johnson's petition for *habeas corpus*, finding that his evidence lacks credibility when viewed in light of the state's evidence. The court weighed two opposite opinions: the opinion of the defense expert psychiatrist and the affidavit provided by his treating counselor. Because the counselor had been seeing Mr. Johnson over a two-year period, and Mr. Johnson's medical records did not contain a mention of delusions, the court found the counselor's opinion more persuasive. The court found persuasive that Mr. Johnson's recent medical records indicated that his medications were adequately controlling his symptoms. Although the court reviewed the expert's report, it ultimately found that the expert's report was contrary to other evidence and found that Mr. Johnson's evidence lacked credibility.

### Discussion

On further appeal, the U.S. Supreme Court denied a stay of execution and petition for writ of *certiorari* (*Johnson v. Vandergriff*, 143 S. Ct. 2551 (2023)). Although the dissenting U.S. Supreme Court justices found Dr. Agharkar's assessment to include compelling evidence, the majority did not discuss the merits of Mr. Johnson's appeal.

The *Johnson* case has implications for forensic psychiatrists who evaluate death row inmates during the appeals process. Evaluating psychiatrists should consider conducting the evaluation of the death row inmate over multiple meetings, if feasible. While travel costs may be prohibitive, virtual interviews should be considered. This would increase the data points relied on in rendering opinions and would support the expert's credibility, especially in the manner the opinion was derived.

While the affidavit from the state's expert in *Johnson* was not from a treating psychiatrist, the ethics principles that guide our profession state that treating psychiatrists should generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes (American Academy of Psychiatry and the Law, Ethics Guidelines for the Practice of Forensic Psychiatry, Adopted May, 2005). In this case, the counselor's affidavit was instrumental in the court's denial of Mr. Johnson's petition for *habeas*. Such a finding has the potential to destroy the therapeutic alliance between the counselor and Mr. Johnson because the counselor's opinion was harmful to him In general, clinicians should only serve one of two roles, treating the inmate, or, evaluating the inmate for legal purposes. Serving in both roles creates significant ethics conflict.

# Risk of Unjustified Civil Commitment Does Not Constitute Discrimination under Title II of the ADA

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## An Individual Has to Be Actually Unjustifiably Institutionalized Rather than Being at Risk for Unjustified Institutionalization to Have a Valid Claim of Discrimination under Title II

DOI:10.29158/JAAPL.240025L1-24

**Key words:** Title II of the Americans with Disabilities Act; integration mandate; unjustified institutionalization; civil commitment; remedial injunctive order

In *United States v. Mississippi,* 82 F.4th 387 (5th Cir. 2023), Mississippi appealed, in part, the U.S. District Court for the Southern District of Mississippi's ruling that its entire mental health system violated Title II of the Americans with Disabilities Act (ADA) and the district court's issuance of a remedial injunctive order. The Fifth Circuit Court of Appeals reversed.

### Facts of the Case

In February 2011, the United States Department of Justice (DOJ) began an investigation of Mississippi's mental health care system for unclear reasons; there was no evidence of individual instances of discrimination against persons with mental illness. This investigation involved interviews with state leaders, community mental health center employees, and disabled persons; various reports were written comparing Mississippi's use of community-based resources to other states' programs.

In December 2011, the DOJ informed Mississippi that its investigation showed the state was senselessly civilly committing individuals with mental illness in violation of Title II. The DOJ sent a letter of findings to Mississippi outlining the necessary steps to be taken to meet DOJ's set criteria for commitment. In August 2014, Mississippi responded in writing to the DOJ outlining the steps it had taken to comply with the DOJ's recommendations. The DOJ decided more forceful measures were needed to get Mississippi in compliance, so it filed a lawsuit against Mississippi in August 2016, under the ADA (and the Civil Rights of Institutionalized Persons Act). The lawsuit did not cite individual instances of discrimination, but rather asserted that "systemic deficiencies" in the state's operation of mental health programs put every Mississippian with a mental illness "at risk" of unnecessary institutionalization in violation of Title II.

To prove its claims, the United States convened a study by six outside experts (two psychiatrists, a clinical social worker, a psychologist, a nurse, and an occupational therapist) who interviewed 154 individuals from a pool of 3,951 Mississippians who had been admitted to state hospitals at least once between 2015 and 2017 and reviewed each of the interviewees' hospital and outpatient records. Based on the interviews and records reviews, the experts answered four predetermined questions for each interviewee, concluding that each interviewee would have avoided, or spent less time in, a state hospital if the interviewee had been provided reasonable community-based services. Among the other data analyzed, these experts found that about 50 percent of 5,070 state hospital admissions from 3,951 patients were repeat, i.e., "cycling admissions."

In September 2019, the district court found that Mississippi's "entire mental health system" violated Title II because it put every Mississippian with a severe mental illness "at risk" of "unjustified institutionalization," using "cycling admissions" as part of their rationale. The court stated the experts' study showed that Mississippi's system of providing mental health care for adults violated the "integration mandate" prescribed by the ADA and reified in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). The court rejected Mississippi's defense that expanding access to its existing community-based services would "fundamentally alter" its mental health system.

The court did not immediately enter a remedial order; it appointed a special master to assist the court and the parties attempted to reach a settlement. Negotiations went on for two years while Mississippi increased the number of community-based programs. Upon pressure from the court, the parties and the special master each submitted a proposed remedial plan. In July 2021, after a hearing, the court adopted the special master's proposed remedial plan, and in September 2021 it issued a remedial injunctive order, appointed a monitor, and entered a final judgment.

The remedial order tasked community mental health centers to prevent unnecessary institutionalization by identifying individuals with mental illness, coordinating their care, and diverting them from unnecessary hospitalization. The court order dictated the quantity of community-based mental health services, how they should be implemented, and policy priorities agencies should follow. It forced the state to fund certain programs, hire additional staff, and sought influence over state chancery courts (chancery courts had jurisdiction over civil commitments). In addition, there were very strict measures by which Mississippi's compliance would be tracked, such as requiring monthly and annual reports, requiring quarterly hearings, posting certain data on a publicly available website, and submitting the data to the DOJ and the monitor. The remedial order was to end only when Mississippi achieved "substantial compliance" and maintained that compliance for one year as determined by the court.

Mississippi contended it had substantially complied with the court's order. The United States withdrew its response to Mississippi's showings. Mississippi moved for a partial stay of the remedial order, which the court granted, pending an appeal to the Fifth Circuit, in which Mississippi contended that the federal government had not proved a cause of action for discrimination in violation of Title II and the court's remedial order vastly exceeded the scope of claimed liability.

### Ruling and Reasoning

In a unanimous decision, the three-judge panel of the Fifth Circuit reversed the district court's ruling. The appeals court ruled the United States did not prove that Mississippi violated Title II pursuant to ADA statute, its implementing regulations, and *Olmstead* "as properly construed."

Regarding the Title II claim, the appeals court referenced the text of Title II, its implementing regulations, and *Olmstead* in stating that nothing in these documents suggested that a "risk of institutionalization," without actual institutionalization, is an actionable claim of discrimination. Similarly, the appeals court stated the integration mandate did not speak to the "risks of maladministration" of public programs. The Fifth Circuit indicated courts must follow the language Congress had enacted and not increase the scope of a statute because the courts think it is good policy or an application of "Congress's unstated will." In addition, the appeals court reasoned that Mississippi's judicial commitment process and subsequent hospital discharge procedures, which include a "least restrictive environment" component made it "hubristic" for a federal court to predict the "risk" that unwarranted civil commitments could be initiated against individuals. The Fifth Circuit also stated that the DOJ's guidance document in the wake of *Olmstead*, which asserted that a "serious risk of institutionalization" was sufficient to establish an ADA claim, had no legal bearing and never underwent appropriate procedures to become a binding document.

Regarding the overarching remedial order claim, the appeals court indicated Mississippi was correct in contending that *Olmstead* did not support a mandate for "court-superintended institution-wide changes" (p 395) based on the "risk of institutionalization" that was generalized from a survey of 154 individuals out of 3,951 Mississippians. The Fifth Circuit stated "generalizations" could assist a state in assessing its own programs but are not sufficient to prove that individuals suffered from "unjustifiable isolation" that was a result of unwarranted institutionalization "en masse." The appeals court stated the risk that "unnamed" persons with serious mental illness or "all such persons" in Mississippi could be unjustifiably committed in the future does not allow courts under the ADA to revamp the state's entire mental health system. The Fifth Circuit ruled the district court's remedial injunction order was too broad even if the United States was able to prove a discrimination claim under Title II.

### Discussion

The Fifth Circuit conceded that there is no guarantee that courts will always be right regarding civil commitment proceedings. Although the appeals court mentioned the DOJ's concern that Mississippi was civilly committing too many individuals without proper basis, it stated the ADA was premised on actual abuses, "not statistical risks." The appeals court maintained that legal discriminations based on mental illness under Title II are individual circumstances that must be evaluated as such, in accordance with the three-part test for discrimination on the basis of "unjustifiable isolation" as delineated in *Olmstead*, where the first two factors of the test are individual specific. Thus, the appeals court stated a claim of system-wide risk of civilly committing an unspecified group of individuals was incompatible with these factors.

If the "at risk" argument had been upheld, this could have substantially increased the numbers of successful lawsuits for claims of discrimination under Title II, since determining who is at risk for unjustifiable institutionalization is more subjective than determining who is actually improperly committed. In addition, upholding the "at risk" argument could have resulted in a state's mental health department engaging in an extensive and expensive overhaul of its services, without a potential endpoint to the overhaul attempts, to ensure they are not in violation of Title II.

The Fifth Circuit's decision applies only to Texas, Louisiana, and Mississippi. In its decision, it mentioned that the Tenth Circuit, in *Fisher v. Oklahoma Health Care Auth.,* 335 F.3d 1175 (10th Cir. 2003), indicated neither ADA statutes nor regulations prohibited claims that a state's reduction in prescription drug benefits would place plaintiffs at risk of civil commitment. The Fifth Circuit also noted the Sixth Circuit was persuaded by the DOJ guidance promoting "at risk" Title II discrimination. The United States could appeal the Fifth Circuit's decision *en banc* or to the U.S. Supreme Court. The U.S. Supreme Court could also decide to hear this case on its own given the differing rulings among the circuit courts of appeals regarding the "at risk" argument. Of note, the U.S. Supreme Court, in *Wal-Mart Stores Inc. v. Dukes,* 564 U.S. 338 (2011), unanimously disapproved of a

theory based on statistical analysis, instead of "individualized evidence," involving Title VII of the Civil Rights Act of 1964.

# Death Penalty, Psychiatric Evidence, and Post-Conviction Relief

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## A Defendant's Claim for Post-Conviction Relief to Vacate a Death Sentence Requires It Be Both Facially Sufficient and Timely

DOI:10.29158/JAAPL.240026-24

**Key words:** death penalty; due diligence; post-conviction relief; autism spectrum disorder; posttraumatic stress disorder

In *Damren v. State*, WL 5968167 (Fla. 2023), the Supreme Court of Florida held that the defendant's claim to vacate his death sentence, on the basis that his autism spectrum disorder (ASD) and posttraumatic stress disorder (PTSD) diagnoses were newly discovered evidence, was both facially insufficient and untimely. The court stated that the one-year period to seek post-conviction relief was triggered whenever ASD became diagnosable in adults.

### Facts of the Case

In May 1994, Floyd Damren entered the grounds of R.G.C. Mineral Sands, stole equipment, and then informed a friend of his desire to take more material from that facility. Several weeks later, Mr. Damren returned and burglarized the facility's electrical shop with an accomplice. The on-grounds duty electrician confronted Mr. Damren's accomplice. Mr. Damren then snuck up behind the electrician and hit him with a steel pipe. The electrician pleaded for mercy, and Mr. Damren paced the floor for a while before deciding to bludgeon the electrician to death. While Mr. Damren was dragging the electrician's body across the floor, the shift supervisor entered the building. Mr. Damren saw the shift supervisor, who ran from the building. The shift supervisor, Mr. Knight, recognized Mr. Damren and identified him to police. Mr. Damren was subsequently arrested and charged with first-degree murder, armed burglary, and aggravated assault.

At trial, the jury convicted Mr. Damren on all charges, voted unanimously for the death penalty, and it was imposed by the judge. In 1997, the Supreme Court of Florida affirmed Mr. Damren's conviction and sentence on direct appeal. In 2003, Mr. Damren's initial motion for post-conviction relief and *habeas* petition were then denied by the Supreme Court of Florida (*Damren v. State*, 838 So. 2d 512 (Fla. 2023)). In 2018, the court again affirmed the denial of Mr. Damren's successive motion for post-conviction relief (*Damren v. State*, 236 So. 3d 230 (Fla. 2018)).

In June 2022, Mr. Damren filed a second successive motion for post-conviction relief. Mr. Damren claimed that newly discovered evidence based on a neuropsychological report in 2021 of his ASD and PTSD diagnoses rendered his death sentence "unreliable." Mr. Damren argued that these diagnoses qualified as newly discovered evidence because ASD was not diagnosed or recognized in adults at the time of the original 1995 trial and his PTSD was undiagnosed because it was "masked" by his previously undiagnosed ASD.

### Ruling and Reasoning

The Supreme Court of Florida affirmed the post-conviction court's summary denial of Mr. Damren's second successive motion for post-conviction relief. The court held that Mr. Damren's claims were both facially insufficient and untimely.

The court affirmed the circuit court's finding that Mr. Damren's second motion for post-conviction relief was untimely. Per Fla. R. Crim. P. 3.851(d)(1) (2022), a motion for post-conviction relief must be filed within one year of the date that the defendant's conviction and sentence became final. The court reasoned that Mr. Damren's conviction and sentence became final after the U.S. Supreme Court denied *certiorari* review of the direct appeal from January 12, 1998 (*Damren v. Florida*, 522 U.S. 1054 (1998)). The exception to the one-year limit is for motions alleging "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the

exercise of due diligence" (Fla. R. Crim. P. 3.851(d)(2)(A)(2022)). Thus, to be considered timely, the motion would have needed to be "filed within one year of the date upon which the claim became discoverable through due diligence" (*Damren*, p 3, citing *James v. State*, 323 So. 3d 158, 160 (Fla. 2021)). Mr. Damren asserted that a diagnosis of ASD was not diagnosable in adults at the time of his trial in 1994. The ASD masked and thus prevented the diagnosis of PTSD. The court stated that Mr. Damren exhibited symptoms of ASD prior to 2019, and he provided no reason why, through due diligence, he could not have been diagnosed prior to the neuropsychological evaluation in 2021. The court noted that Mr. Damren's claim that counsel had no indication that he exhibited symptoms of ASD "strains credibility." The court cited the neuropsychological report that documented longstanding symptoms commonly associated with ASD and held that "counsel's ignorance does not result in a triggering date that manifests only when counsel decides to enlighten himself" (*Damren*, p 3).

Referencing *Jones v. State,* 709 So.2d 512 (Fla. 1998), the court used the two-pronged *Jones* test to determine if the conviction could be set aside based on newly discovered evidence. *Jones* requires the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of due diligence," (*Jones*, p 521) and that newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Mr. Damren was not seeking to overturn his conviction, but rather to reduce his sentence, which did not apply to the first prong of the *Jones* test. The court found Mr. Damren's claim that the newly discovered evidence of reasonable possibility did not meet the legal requirement for the probable result of a different sentence.

The *Jones* test also "requires that the newly discovered evidence would probably yield a less severe sentence" (*Walton v. State,* 246 So. 3d 246 (Fla. 2018), p 249). Mr. Damren had alleged that evidence of ASD and PTSD, combined with his use of alcohol on the night of the murder would have "made a life sentence a reasonable and merciful sentence" (*Damren*, p 2). The court found that Mr. Damren's assertion that the jury would have found a life sentence "reasonable" rather than probable was facially insufficient.

## Discussion

In death penalty cases, the defendant may raise numerous challenges to seek acquittal on retrial or reduce the sentence by presenting mitigating factors. Individuals with mental illness may present evidence of psychiatric diagnosis as a way of demonstrating reduced criminal culpability or seeking mitigation at sentencing during the penalty phase of the trial. Mr. Damren attempted to provide newly discovered evidence of ASD and PTSD diagnoses to vacate his death sentence.

Neither Mr. Damren nor the Supreme Court of Florida clearly identified when the criteria for diagnosing ASD had changed to permit this diagnosis in adults. At the time of Mr. Damren's initial trial in 1995, the Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV) was in regular use. In 2013, DSM-5 was published and subsequently removed any age requirements in diagnosing the new ASD. If Mr. Damren had made the argument that ASD could not be diagnosed as an adult at the time of his initial trial using DSM IV-TR, then the transition to DSM-5 would no longer have prevented the diagnosis from being made as early as 2013.

At the beginning of the DSM-5, there is a Cautionary Statement for Forensic Use that reads in part "diagnoses and diagnostic information can assist legal decision makers in their determinations [. . .] However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings" (Diagnostic and Statistical Manual, Fifth Edition. American Psychiatric Association; 2013. p 25). The DSM-5 acknowledges that "dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis" (DSM-5, p 25). Similarly, clinical diagnoses rely on the guidance of classification systems such as the DSM which may not always perfectly capture the clinical picture of the individual.

Psychiatry continues its effort to understand and classify mental illness; each new iteration of the DSM brings with it revised classifications that clinicians need to be aware of. The forensic psychiatrist, in consultation with legal counsel, is best suited to educate the court on updates in psychiatric diagnoses and the relative medicolegal implications of those changes. Similarly, counsel has an obligation to explain the relevant laws applicable to death penalty cases when consulting with the forensic psychiatrist. Based on

symptoms described in Mr. Damren's neuropsychological evaluation, ASD could have been recognized and diagnosed in 2013 when the age criteria changed (presuming that sufficient early childhood records and collateral information were available). This illustrates the importance of utilizing forensic psychiatric expert consultation when the question of a mental disorder is raised within a legal framework, especially one as perilous as a sentence of death.

# Applying the *Bruen* Standard to Firearm Regulations and Marijuana Use

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## Historical Substance Use without Intoxication is Not Sufficient to Restrict Gun Rights

DOI:10.29158/JAAPL.240026L1-24

**Key words:** gun rights; substance use; intoxication; dangerousness; Second Amendment

In *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023), the Fifth Circuit Court of Appeals reversed the district court's conviction for possession of a firearm while being an unlawful user of a controlled substance because there was no evidence the defendant was intoxicated at the time he was found in possession of a firearm. The Fifth Circuit Court of Appeals utilized reasoning from *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, 597 U.S. 1 (2022) (*Bruen*) to find the 1968 U.S. Congress Gun Control Act (GCA) (18 U.S.C. § 922(g)(3)(2015)) unconstitutional.

### Facts of the Case

In April 2022, Patrick Daniels was pulled over for driving without a license plate. One of the two officers at the scene was a DEA agent who reported smelling marijuana and, as a result, searched his vehicle. They found marijuana cigarette butts in Mr. Daniels' ashtray and found two loaded firearms, a 9-mm pistol and semiautomatic rifle. After being *Mirandized*, Mr. Daniels stated he had smoked marijuana fourteen days per month since high school. He was subsequently charged with violating the GCA which made it illegal for any "person who is an unlawful user of or addicted to any controlled substance" to possess a firearm (18 U.S.C. 922(g)(3)). Law enforcement did not test Mr. Daniels for the presence of illicit substances, in this case specifically marijuana, and the officers did not testify as to whether Mr. Daniels appeared intoxicated during the traffic stop.

Mr. Daniels filed a motion in district court to have his indictment dismissed based on *Bruen,* which found that firearm restrictions are unconstitutional unless firmly rooted in the country's history and tradition of firearm regulation. Mr. Daniels' motion was denied. The court ruled that, as a habitual drug user, Mr. Daniels was in the class of individuals who historically have been disarmed because they demonstrated a "dangerous lack of self-control." The court also pointed out the GCA had been in place since 1968 and was in concert with this historical practice.

Mr. Daniels was found guilty and sentenced to nearly four years in prison and three years of supervised release and was banned from possessing firearms in the future because of this felony conviction. Mr. Daniels petitioned the Fifth Circuit Court of Appeals to vacate his conviction arguing that the GCA was unconstitutional.

### Ruling and Reasoning

The Fifth Circuit Court of Appeals reversed the district court's decision finding that the ban preventing people who use marijuana from possessing firearms is unconstitutional. The court cited the lack of evidence proving Mr. Daniels was intoxicated at the time of his arrest. The court noted that, historically, the government has made the use of firearms illegal while intoxicated but the same restriction has not applied to those who possess but do not use firearms while under the influence.

The court explained that Congress has the right to limit access to firearms for those who are a danger to society, felons, or have mental illness. The Fifth Circuit stated that marijuana use fourteen days per month did not necessarily make Mr. Daniels a danger to society and referenced his lack of violent history. Utilizing the historical tradition-based reasoning from the *Bruen* opinion, the court reviewed historical substance use-related laws. The court noted that such laws emphasized intoxication in the setting of firearm use. Mr. Daniels was neither proven to be intoxicated

nor actively using his firearms at the time his firearms were discovered by the police officers. The court determined the GCA was not consistent with historical tradition and was therefore unconstitutional: "In short, our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users" (*Daniels*, p 340).

### Discussion

The government has a long-standing interest in limiting access to firearms for those who have been deemed dangerous, including those who are intoxicated. The court ruled that contrary to the GCA, regular substance use should not be considered dangerous unless the person has a known history of violence or mental illness, or has been proven intoxicated in the setting of firearm use. Proving marijuana intoxication is of increasing legal interest in the United States as marijuana is legalized in more and more states. Hair or urine samples are typically used to test for marijuana, but these tests cannot delineate the timing of most recent use or a level that indicates intoxication. As with alcohol, blood testing is not realistic in the setting of traffic stops. Some breath and saliva tests have been developed that can detect marijuana within minutes after consumption, but reliability varies so these methods are not widely used. In most states, a blood alcohol level of 80 mg/dL or .08 percent indicates impairment. Many states do not have clearly defined levels for marijuana impaired driving. Some state laws specify that a THC level above 5 ng/mL indicates driving while impaired. Notably, this THC limit was unsuccessfully challenged in *State v. Fraser*, 509 P.3d 282 (Wash. 2022). Also of considerable interest will be the development of other tests that measure the level of marijuana and the establishment of a level that indicates impairment.

To determine if a law is constitutional, the U.S. Supreme Court, as a rule, uses one of three levels of judicial scrutiny. This approach was first proposed in the late 19th century and was common practice by the mid-20th century. The highest level of scrutiny, strict scrutiny, requires the government to prove that a law is narrowly tailored to further a compelling government interest. It is used in an equal protection claim and the law in question must infringe on a fundamental right, e.g., the right to marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)) or a specific classification, e.g., race (*Brown v. Board of Education*, 347 U. S. 483 (1954)).

A lower level of judicial analysis is intermediate scrutiny. It requires that a law serves an important government objective and is substantially related to that objective. It is applied to laws related to sex (*Craig v. Boren*, 429 U.S. 190 (1976)) and sexual orientation (*Romer v. Evans,* 517 U.S. 620 (1996)). In both strict and intermediate scrutiny, the government has the burden of proof.

The lowest level of scrutiny is called rational basis review. It requires the court to consider whether a statue is rationally related to a legitimate government interest. Rational basis review is applied to challenge laws that deal with felony status, wealth, age, and disability (Snider, B. Challenging Laws: 3 Levels of Scrutiny Explained [Internet]; 2020. Available from: https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/. Accessed November 19, 2023).

In *Bruen*, the Court delineated a new test for the analysis of the constitutionality of a law dealing with the Second Amendment, i.e., historical tradition-based reasoning. In *Bruen*, New York State required those applying for an unrestricted license to carry a concealed firearm demonstrate a special need or proper cause for self-defense. The U.S. Supreme Court ruled that a general self-defense interest is sufficient; therefore, the proper cause stipulation violated the Fourteenth Amendment and prevented law abiding citizens from exercising their Second Amendment right to bear arms. The *Bruen* opinion instructed courts to assess firearm laws with analogical reasoning through the lens of history and tradition rather than tiers of constitutional scrutiny. This type of reasoning encourages the courts to identify historical laws that are analogous but not identical to the law in question and incorporate those historical laws in their analysis. This test was applied to Mr. Daniels' case by citing historical laws in which firearm use was illegal while intoxicated but not for being an alcohol user. The application of *Bruen* will continue to evolve. In *U.S. v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), argued before the U.S. Supreme Court in November 2023, the constitutionality of a law restricting firearm access in the context of civil orders of protection for domestic violence claims is under review. It will be interesting to watch the unfolding of "historical tradition of

firearm regulation" as it applies to a wide variety of criminal and civil matters.

# Statutory Allowance of Certain Incriminating Testimony by Expert Witnesses in Wyoming

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## Wyoming Statute and the Open-Door Doctrine Allow for the Disclosure of Incriminating Information during Psychiatric Expert Witness Testimony under Narrow Conditions

DOI:10.29158/JAAPL.240027-24

**Key words:** expert witness testimony; admissible evidence; open-door doctrine; confidentiality

In *Adams v. State*, 534 P.3d 469 (Wyo. 2023), the Supreme Court of Wyoming evaluated an appeal by Jett Garriott Adams, who alleged that his conviction for multiple charges, including attempted murder, was unfair because of prosecutorial misconduct. Mr. Adams' appeal specifically identified expert witness testimony provided by two psychologists as prejudicial. The court affirmed the lower court's ruling and found that the expert witnesses' testimony was not prejudicial and was protected by the open-door doctrine and Wyoming statute.

### Facts of the Case

Mr. Adams was charged in Wyoming with ten offenses that stemmed from a high-speed chase and a shootout with a law enforcement officer. Mr. Adams' journey began in Missouri, where he committed a probation violation for a felony conviction after missing a probation revocation hearing. With the understanding that he was bound for prison, Mr. Adams purchased a firearm, planned to purchase more, and conspired to shoot court and law enforcement personnel to avoid prison. But he ultimately chose to cut off his GPS monitor and depart Missouri with a plan to relocate anonymously in Idaho.

In Wyoming, Mr. Adams was stopped by an officer for a traffic stop, which led to a short high-speed chase that concluded with the exchange of gunfire. After this firefight, Mr. Adams again sped away. Several law enforcement officers gave pursuit, and Mr. Adams fired repeatedly at the officers while driving. Mr. Adams eventually pulled off the road and fled on foot. Officers arrested Mr. Adams and he was charged with attempted murder, aggravated assault and battery, felony interference with a peace officer, felony property destruction, aggravated fleeing a police officer, use of a firearm while committing a felony, reckless driving, reckless endangerment, and speeding.

Mr. Adams was found competent to stand trial by psychologist Paul Murdock, PsyD. Mr. Adams requested a bench trial and pleaded not guilty by reason of mental illness or deficiency (NGMI), defined by Wyo. Stat. Ann. § 7-11-305 (1985). Renee Wilkinson, PhD, conducted an NGMI evaluation and diagnosed Mr. Adams with depression, anxiety, and borderline personality disorder. Dr. Wilkinson opined that Mr. Adams appreciated the wrongfulness of his conduct and could conform his conduct to the requirements of the law. Mr. Adams' counsel requested that the Public Defender's office pay for a second evaluation, which was denied. Mr. Adams then wrote a *pro se* letter to the court requesting assistance in obtaining a second NGMI evaluation, to no avail.

At trial, the state called Dr. Wilkinson as a witness, and she gave biographical information about Mr. Adams, including his background and psychiatric history. She opined that Mr. Adams did not meet criteria for an NGMI defense. Later, Mr. Adams testified for several hours in his own defense. The state then called Dr. Murdock as a rebuttal witness, and he was cross-examined by the defense. During cross examination, the defense asked Dr. Murdock to testify regarding his diagnosis of Mr. Adams with posttraumatic stress disorder, and about Mr. Adams' mental state at the time of the offense. This testimony was followed by a limited redirect examination by the state. During this redirect examination, the prosecution asked a series of yes and no questions regarding Mr. Adams' mental state at the time of the offense, during which Dr. Murdock spontaneously testified as to Mr. Adams' stated intent to shoot a law enforcement officer.

The three-day trial ended with Judge Dawnessa Snyder finding Mr. Adams guilty on nine counts,

including attempted murder and aggravated assault and battery. Judge Snyder sentenced Mr. Adams to life without parole and consecutive sentences of various lengths. Mr. Adams appealed the ruling, stating that testimony by his mental health evaluators was inadmissible evidence based on Wyo. Stat. Ann. § 7-11-303 (2023) and § 7-11-304 (2009), on the grounds that they provided incriminating testimony. Further, Mr. Adams' appeal included concern that prosecutors committed prosecutorial misconduct in their use of inadmissible evidence by asking legally objectional questions. Because Mr. Adams did not object to prosecutorial questioning of either evaluator during the trial, upon his appeal the Wyoming Supreme Court reviewed the case for misconduct.

### Ruling and Reasoning

The court summarized the concern of the appeal as whether the state of Wyoming committed prosecutorial misconduct by introducing statements and information obtained during Mr. Adams' mental health evaluations. The court ruled that the prosecutor did not knowingly use inadmissible evidence or ask objectional questions, and that Mr. Adams suffered no prejudice because of their testimony. The court ruled that, in absence of knowingly providing inadmissible evidence, and in absence of testimony negatively affecting Mr. Adams, the threshold of prosecutorial misconduct was not crossed. In this ruling, the court did not decide if a rule of law was clearly and unequivocally violated.

This decision marked the first time that the Wyoming Supreme Court reviewed Wyo. Stat. Ann. § 7-21-303 (2023), which addressed how information from mental health evaluations can be used in evidence. First, for alleged prosecutorial misconduct to be found, the defendant must show that the record is clear that an alleged incident was a violation of a clear and unequivocal rule of law, and that this violation led to the denial of a substantial right, causing a material prejudice. Further, prosecutorial misconduct requires that the violation must have been an action that the prosecutor knew, or should have known, would compromise the fairness of the trial. The court acknowledged the importance of this determination, considering the state called both Dr. Wilkinson and Dr. Murdock as witnesses.

The court ruled that that the state did not knowingly attempt to get inadmissible testimony from expert witnesses. Dr. Murdock, for example, spontaneously volunteered information during his testimony, and the court found no evidence that the prosecution anticipated or prompted Dr. Murdock's answer, nor did the prosecution rely on this information for their case. During cross examination, the defense counsel questioned Dr. Murdock about Mr. Adams' psychiatric symptoms and mental status at the time of the offense, "opening the door" for discussion of this subject matter. Though the court acknowledged the importance of the well-established rule of limiting testimony by psychiatric examiners, "A defendant's statements offered as a basis for an expert's opinion on the issue of his mental condition—whether sanity, competency, or other mental illness or deficiency—are admissible and fall within the limitation prescribed by Federal Rule of Evidence 12.2c" (*Adams*, p 476, citing *U.S. v. Madrid*, 673, F.2d 1114 (10th Cir. 1982), p 1120-121). The court also cited *Buchanan v. Kentucky*, 483 U.S. 402 (1987), which further established the admissibility of evidence obtained during competency evaluations in cases where a defendant raises the subject of mental state at the time of offense.

The court reasoned that Dr. Murdock's and Dr. Wilkinson's testimony was not prejudicial, and Mr. Adams's own testimony was crucial to this facet of the opinion. Mr. Adams accused prosecutorial misconduct concerning Dr. Wilkinson's discussion of Mr. Adams' childhood; however, Mr. Adams offered more extensive and detailed testimony on this subject. Mr. Adams also had a problem with Dr. Murdock's discussion of his intention while firing at police, but the court noted that Mr. Adams offered more detail about his intention to harm or kill the law enforcement officer than did Dr. Murdock.

### Discussion

The Wyoming Supreme Court recognized that, in this case, select incriminating testimony by expert witnesses superficially appeared to violate §§ 7-11-303 and -304, which define what information obtained by mental health examiners is admissible in court. But, in ruling that the expert testimony was admissible, the court cited multiple extenuating circumstances of its decision. One expert witness spontaneously volunteered an incriminating statement after Mr. Adams' counsel "opened the door" to this subject matter, making his testimony fair evidence. A second expert witness offered background information about Mr. Adams, but the court found that Mr. Adams' own extensive and self-incriminating

testimony nullified any prejudicial value of the expert witnesses' testimony. Because the court found that the state did not knowingly apply inadmissible evidence, nor was the allegedly inadmissible evidence prejudicial against Mr. Adams, there was no prosecutorial misconduct.

As discussed in the American Academy of Psychiatry and the Law Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, eliciting a defendant's account of events surrounding an alleged offense may be valuable when determining the defendant's competence to stand trial (Mossman, D, *et al*. AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. J Am Acad Psychiatry Law 2007 Dec; 35(4):S3-S72, p S35). *Adams* illustrates that, depending on jurisdiction, a real risk exists that incriminating information becomes part of testimony. An understanding of open-door doctrine should guide a nuanced notification of the nonconfidential nature of the forensic interview.

# A Federal Prisoner's Challenge to Indefinite Civil Commitment

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### The Eighth Circuit Affirms the Indefinite Civil Commitment of a Federal Inmate Prior to Release

DOI:10.29158/JAAPL.240027L1-24

**Key words:** dangerousness; civil commitment; mental incapacity; prisoner rights; risk assessments

In *United States v. Becerra*, 73 F.4th 966 (8th Cir. 2023), Erik Becerra argued that a district court judge erroneously granted a civil commitment petition against him prior to his scheduled prison release. In affirming the lower court's decision, the Eighth Circuit Court of Appeals held that the evidence was sufficient to establish the requisite causal nexus between Mr. Becerra's mental condition and his dangerousness for indefinite civil commitment under 18 U.S.C § 4246(a) (1997). The court also found that the government officials' ability to monitor an inmate following release was irrelevant to the civil commitment dispute.

#### Facts of the Case

Mr. Becerra was diagnosed with various mental disorders, including schizophrenia, dating back to 2013. In 2017, he was convicted of firearm and ammunition possession as a felon. He received an 80-month prison sentence and was scheduled for release in January 2021. During his incarceration, he assaulted and threatened prison staff and other inmates. He was evaluated and found incompetent and not responsible for those acts because of his mental illness. In December 2020, a risk assessment review panel at the Federal Medical Center in Rochester, Minnesota (FMC Rochester) determined that Mr. Becerra's mental condition created a substantial risk of bodily injury to others or serious damage to property if released to the community.

Accordingly, the government filed a civil commitment petition under 18 U.S.C. § 4246(a), which permits indefinite hospitalization of a federal prisoner who is due for release but poses a significant danger to the public because of mental illness. The petition included the review panel's report and the FMC Rochester warden's certification that suitable state custody placement was unavailable. Per statute, the matter was referred to a magistrate judge for consideration.

During the magistrate judge's proceedings, Mr. Becerra motioned to proceed *pro se*. Following two hearings addressing his motion, the judge found that Mr. Becerra was unable to perform the basic tasks necessary to present his defense unassisted by counsel. The judge then heard testimony from an FMC Rochester psychologist, who was involved in preparing the review panel's report. The psychologist reiterated that Mr. Becerra's release would create a substantial risk of bodily injury to others and indicated that her opinion was based on clinical interviews, behavioral observations, and the structured instrument, HCR-20. Subsequently, Mr. Becerra testified and questioned his underlying conviction and the validity of the § 4246 proceedings. His testimony included delusions that the U.S. Congress approved his violent acts, and that England granted him a license to kidnap people. Thereafter, the magistrate judge issued a report and recommendation (R&R) advising the district court to grant the government's petition.

During the district court's proceedings, Mr. Becerra filed five objections to the R&R. He argued that, because his 2003 and 2005 convictions occurred before his mental illness onset in 2013, the R&R improperly relied on them when establishing his violence history. He also claimed that the R&R improperly relied on assaultive behaviors stemming from minor altercations that were not abnormal for the prison population. He contended that the R&R ignored the nonviolent nature of his underlying conviction of firearm possession and ignored that he had never acted on his delusions. Finally, he argued that the R&R failed to adequately acknowledge that, if released, the government could monitor him during his mandated supervision period, thereby reducing safety concerns.

The district court rejected Mr. Becerra's objections, finding that his first four challenges were inconsistent with the available evidence. Regarding his last objection, the district court agreed with the magistrate judge's view that the pertinent question was not if Mr. Becerra could be returned to prison later, if necessary, but instead, if, given the documented risks, the court could allow his release in the first place. Mr. Becerra appealed the district court's decision granting the civil commitment petition and challenged the court's reliance on his criminal record, history of possessing weapons, violent acts in prison, and substance use history and medication noncompliance. Overall, he argued that the government's evidence failed to establish that he posed a substantial risk of danger to others if released.

### Ruling and Reasoning

The Eighth Circuit Court of Appeals, applying a clearly erroneous standard analysis, held that the district court's findings were not erroneous and affirmed the lower court's decision. The court rejected Mr. Becerra's argument that his pre-2013 criminal history lacked nexus between his disorders and dangerousness because Mr. Becerra did not grasp that the requisite nexus was to be found between his current mental condition and his dangerousness, and not during an earlier timeframe. The judge highlighted evidence showing that, when Mr. Becerra's mental illness deteriorated in prison, his delusionally-based aggression toward peers and correctional staff escalated. The court emphasized expert testimony delineating a clear connection between Mr. Becerra's incidents of aggression and his mental illness, including situations where he was deemed Not Competent, Not Responsible.

The court rejected Mr. Becerra's argument that his underlying weapons possession conviction was nonviolent and, therefore, was improperly considered. Although it was ultimately a nonviolent offense, Mr. Becerra misunderstood the significance of the weapon possession evidence. The court noted Mr. Becerra's delusional reasons for carrying the firearm caused by his mental illness, his expressed intent to execute law enforcement agents and anyone he deemed fit in 2020, and his belief that his assaultive behaviors were legally authorized. The court found the evidence of illegal gun possession and beliefs of legal authority to kill as relevant and sufficient to establish his dangerousness.

The court rejected Mr. Becerra's argument that the lower court failed to credit his improvement and decreased aggression in prison after his medication adherence. The circuit court observed that the lower court had considered his recent improvements but found that those improvements did not negate the overall finding of dangerousness. The circuit court was not persuaded by Mr. Becerra's assertion that the district court improperly disregarded the sentencing court's and probation officials' authority to monitor him and mandate him to participate in treatment following his release, focusing on his substance abuse and medication noncompliance.

Considering that point, the court highlighted the government's legal obligation to present evidence demonstrating a mental disease or defect, dangerousness if released, and a direct causal nexus between the mental disease and dangerousness. The court explained that the district court's legal obligation was to assess that evidence utilizing a clear and convincing evidence standard in reaching a decision. The court stressed that the civil commitment determination was not bound by any legal authority to consider government officials' ability to monitor and control an individual after release in lieu of commitment. Ultimately, the circuit court rejected Mr. Becerra's overall assertion that the government's evidence failed to establish that he experienced a mental illness creating a substantial risk of danger to others, if released.

### Discussion

*Becerra* addresses the civil commitment of a federal prisoner at the end of his sentence, and whether a district court erred in weighing various historical factors without accounting for possible community monitoring alternatives to commitment. The case hints at the inherent tensions involved in assessing

the risk of future dangerousness versus constitutionally derived liberty rights of individual citizens. Necessarily, such rights are balanced against governmental interests in protecting the public from foreseeable danger associated with active mental illness. Yet, the certainty of accurate prediction of dangerousness remains an elusive target, given the limitations of actuarial and clinical approaches in assessing future behavior. The challenges to civil commitment in *Becerra*, in some ways, spoke to those limitations.

Risk assessments typically rely on the consideration of static and dynamic risk factors. In this case, a risk review panel combined clinical judgment with a structured instrument, the HCR-20. Given the limited predictive accuracy of clinical judgment alone, including the potential for bias and subjectivity, the inclusion of a structured instrument likely strengthened the government's opposition to the prisoner's objections. Most important, in this case, was the effectiveness of expert testimony in establishing the requisite nexus between the prisoner's mental condition and the risk of future dangerousness. The expert's clear delineation of the connection between the individual's historical risk factors, his active symptoms and behaviors, and the likelihood of future dangerousness was central to the circuit court's decision to affirm the lower court's ruling. With those factors considered together and effectively communicated to the court, Mr. Becerra's objections to the risk assessment approach were unlikely to be successful.

# Competency to Stand Trial following a Suicide Attempt

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## Substantive Evidence Required to Necessitate Constitutional Competency Hearing

DOI:10.29158/JAAPL.240028-24

**Key words:** competency; suicide; hearing; trial; capacity

In *State v. Flow*, 886 S.E.2d 71 (N.C. 2023), the North Carolina Supreme Court affirmed the decision of the lower courts, holding that the trial court did not erroneously decline to make further inquiry into the defendant's capacity to proceed with his trial and therefore did not violate the United States Constitution or the North Carolina General Statutes by declining to conduct a formal competency hearing following the defendant's apparent suicide attempt.

### Facts of the Case

Scott Flow was charged with rape, burglary, kidnapping, sexual offense, possession of a firearm by a felon, and violation of a protection order for events that took place in Dallas, North Carolina between May 26 and May 27, 2018. Trial proceedings began on December 9, 2019. Two colloquies were conducted by the trial judge with the defendant on December 13 and December 16, 2019 to determine whether the defendant was freely and intelligently making the decision to not testify or present other evidence in his defense. After the second colloquy, the jury heard closing arguments from both sides. The trial proceedings were then concluded for the day.

On the morning of December 17, 2019, Mr. Flow jumped from a mezzanine level within the jail. He sustained injuries to his leg and ribs. Subsequently, the defense challenged the defendant's competency to proceed with trial under N.C. Gen. Stat. § 15A-1002 (2009). Following a recess from the trial proceedings, both the prosecution and defense were given an opportunity to present their findings regarding the events that transpired on December 17, 2019. The prosecution argued for Mr. Flow's absence to be considered voluntary. The state further contended that Mr. Flow's actions may not have been suicidal in nature. In contrast, defense counsel expressed the opinion that proceeding without Mr. Flow in attendance would infringe on his due process rights as well as his right to jury trial. The trial court's analysis focused on whether Mr. Flow's actions were voluntary, rather than the question of whether his actions amounted to a suicidal gesture. The trial court concluded that Mr. Flow had voluntarily absented himself from the trial. Consequently, the trial proceedings were allowed to move forward, leading to his conviction.

Mr. Flow appealed his conviction to the court of appeals, arguing that the trial court had erred in denying defense counsel's motion to conduct an inquiry into his capacity to proceed with trial. Mr.

Flow based his arguments on N.C. Gen. Stat. § 15A-1001 (2015) N.C. Gen. Stat. § 15A-1002 (2009), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court of appeals found there had been no error by the trial court. Mr. Flow then appealed to the Supreme Court of North Carolina.

### Ruling and Reasoning

In a two to one decision, the Supreme Court of North Carolina held that the trial court did not erroneously decline to make a further inquiry into Mr. Flow's capacity to proceed with trial following the events of December 17, 2019. The court found that the initial motion by defense counsel was satisfactory in initiating the hearing procedures defined by N.C. Gen. Stat. § 15A-1002 (2009). But, the majority said that this statute offers only "sparse guidance regarding the procedural and substantive requirements of the competency hearing" (*Flow*, p 85). The majority noted that, in this instance, the trial court conducted a hearing in which the court received testimony regarding the events of December 17, 2019 and heard arguments from both the prosecution and the defense. The majority said that this examination was "statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present" (*Flow*, p 86). Specifically, the trial court permitted defense counsel to visit Mr. Flow in the hospital and collect evidence relevant to his nonattendance in court, which the defense deemed appropriate for presentation.

The court further explained that, upon reconvening, the trial court had sought evidence concerning Mr. Flow's mental health history, any observations of prior instances of his experiencing mental or emotional disturbance, and details about Mr. Flow's behavior preceding and during his apparent suicide attempt. After reviewing all the available evidence, the trial court determined that, at the time of the alleged suicide attempt, Mr. Flow had the capacity to proceed with trial. In addition, the trial court concluded that, in regard to the events of December 17, 2019, Mr. Flow had acted in a voluntary manner and had thereby waived his right to be present at all stages of his trial. The majority acknowledged that the trial court did not consider whether Mr. Flow had attempted suicide by his jump. But, the court found that this did not indicate a disregard for the defendant's capacity to proceed at trial. The court said, "suicidality does not automatically render one incompetent; conversely, a defendant may be found incompetent by way of mental illness without being determined to be suicidal" (*Flow*, p 86). Hence, the court found that the trial court was not obligated to make a distinct decision as to whether Mr. Flow's actions constituted a suicidal gesture.

With regard to the Due Process Clause argument presented by Mr. Flow, the court noted that the requirements for a constitutional competency hearing are more extensive. But, these requirements are activated only when the trial court is confronted with substantive evidence indicating the defendant's incompetence. The defense highlighted three points which it argued demonstrated Mr. Flow's incompetence: his prearrest actions which included erratic behavior (e.g., rants about being the target of gunshots, smashing of his own wristwatch without any apparent cause), the atypical use of a racial slur, and the nature of his crimes; his suicide attempt; and testimony which showed Mr. Flow was heavily medicated and experienced difficulty communicating in the hospital following his suicide attempt.

The court dismissed the third category as it concerned post-attempt events. In addition, the court emphasized that the second category on its own did not establish Mr. Flow's incompetence. Finally, the court concluded the evidence under the first category was insufficient to demonstrate substantial evidence of Mr. Flow's incompetence. Furthermore, the trial court had the opportunity to personally observe and engage with Mr. Flow throughout the trial. The court considered the evidence presented by the defense during the hearing and concluded that none of this evidence suggested either a history of mental illness or an inability to engage with or comprehend legal proceedings before the suicide attempt. Consequently, there was no substantial evidence warranting further investigation by the trial court.

### Discussion

*Flow* underscores the importance of forensic psychiatrists' understanding the criteria utilized by courts in their respective jurisdictions to determine whether an inquiry into a defendant's competence to stand trial is warranted. It emphasizes the distinction between the standards for competence to stand trial and the threshold that must be met before a court must order such an evaluation. The court in this instance held

that a standard requiring the presence of substantial evidence of lack of capacity to proceed with trial is appropriate before requiring the trial court to order a formal evaluation of competence to stand trial. In *Flow*, the court concluded that insufficient evidence of lack of capacity to proceed with trial was present to require a formal inquiry into Mr. Flow's competence to stand trial.

Forensic psychiatrists must be well-versed in the standards that trigger an inquiry into incompetence to stand trial in their jurisdiction. For example, in *Flow*, the Supreme Court of North Carolina noted the presence of a mental illness alone does not automatically signify that a defendant is incompetent to stand trial. While the existence of a mental illness may affect an individual's cognitive and emotional functioning, it does not necessarily render the individual incapable of meeting the legal standard of competency to stand trial.

This case further highlights that a defendant's suicide attempt, though indicative of a significant level of distress, should not be automatically equated with incompetence to stand trial. Similarly, a defendant's commission of a heinous and irrational crime does not justify a presumption that the defendant lacks the competence to stand trial. The present case serves as a reminder that forensic psychiatrists must avoid equating the presence of maladaptive behaviors (e.g., a suicide attempt), the mere presence of a mental disorder, or the nature of the alleged crime with a defendant's lacking the competence to stand trial. Instead, forensic psychiatrists must always carefully evaluate how the symptoms of a mental illness affect the specific elements outlined in legal standards defining competence to stand trial. This approach ensures a fair and accurate assessment of a defendant's competence to stand trial within the legal framework.

# Failure to Protect Requires Subjective Knowledge of Risk

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## Qualified Immunity Applies to Officials Who Do Not Have Subjective Knowledge of Inmate's Suicide Risk

DOI:10.29158/JAAPL.240028L1-24

**Key words:** qualified immunity; suicide; deliberate indifference; jail; subjective knowledge

In *Edmiston v. Borrego*, 75 F.4th 551 (5th Cir. 2023), a plaintiff alleged that jail officials violated a pretrial detainee's right to protection, under the Eighth and Fourteenth Amendments, from suicide. The defendant officials moved to dismiss the case on the basis of qualified immunity. The U.S. Court of Appeals for the Fifth Circuit held that although the detainee was not screened for suicide risk at the time of intake, the plaintiffs did not demonstrate that the officials had the requisite subjective knowledge of the detainee's risk of suicide, and this subjective knowledge is necessary to demonstrate a failure to protect.

### Facts of the Case

In Culberson County, Texas, on the night of July 6, 2019, decedent John Schubert called a jail official (Oscar Borrego) and said someone was trying to kill him (Schubert). That night, Mr. Schubert made similar statements to an off-duty trooper and to someone inside a hotel. The trooper and an individual at the hotel notified Mr. Borrego. Mr. Borrego instructed Sheriff's Deputy Melendez to respond. Per the Deputy's statement, when apprehended, Mr. Schubert "appeared nervous and said that people were trying to kill [him]" (*Edmiston*, p 555). Mr. Schubert did not provide his correct birth year. To identify him, Deputy Melendez brought Mr. Schubert to a Border Patrol Station. There the Deputy determined Mr. Schubert had a warrant for parole violation. Deputy Melendez arrested Mr. Schubert and brought him to the jail at 12:14 am on July 7. Mr. Schubert told Mr. Borrego and another official, Sheriff Carrillo, that he had left El Paso, had a history of drug abuse, and had left a halfway house in Horizon after "they were mean to him at the facility, and . . . he had had enough" (*Edmiston*, p 556).

The jail officials did not complete an intake mental health screening as specified by the Texas Commission on Jail Standards (TCJS). Mr. Schubert was not wearing a shirt and said this was because his shirt was wet. He was given correctional attire and placed in a cell at 1:42 am. He again told Deputy

Melendez that "someone was trying to kill him" (*Edmiston*, p 556). Mr. Borrego gave Mr. Schubert a mattress. Suicide precautions were not initiated. At 1:48 am, Mr. Borrego asked another jail staff member (Ms. Zambra) to check Mr. Schubert's driver's license and criminal history. She did so. She also requested a report of his medical history, which returned as "no match." At 2:42 am, she checked on the jail's detainees. At Mr. Schubert's cell, she observed him half-kneeling with a sheet around his neck. The other end of the sheet was tied to a shelf. He was nonresponsive. After being notified, Sheriff Carrillo arrived within minutes, began providing CPR, and instructed Ms. Zambra to call emergency services. Emergency personnel arrived at 2:59 am. Mr. Schubert was pulseless, not breathing, and was pronounced dead. His manner of death was listed as suicide caused by asphyxia from hanging.

The plaintiffs, administrator of Mr. Schubert's estate and heirs, claimed Mr. Borrego, Sheriff Carillo, and Deputy Melendez violated Mr. Schubert's Eighth and Fourteenth Amendment rights by failing to protect him from suicide. The defendants filed motions to dismiss based on qualified immunity. The district court denied the motions in 2022 and ruled that based on Mr. Schubert's "fragile psychological state; his statements regarding an unidentified assailant; and [officials'] knowledge about the risk of jail suicides," the defendants had the necessary subjective knowledge of an "obvious" risk of suicide or serious harm (*Edmiston*, p 557). The court stated that if an official has subjective knowledge of suicide risk and gives a detainee a ligature such as loose bedding, this act constitutes deliberate indifference and nullifies the official's qualified immunity. The defendants appealed.

### Ruling and Reasoning

Citing prior case law, the Fifth Circuit Court of Appeals stated that "pretrial detainees have a Fourteenth Amendment right to protection from a known risk of suicide" (*Converse v. City of Kemah,* 961 F.3d 771 (5th Cir. 2020), p 775). If an official is aware of facts (including circumstantial evidence) from which they infer substantial risk of a detainee's suicide exists and fail to take actions to mitigate the risk, that would constitute deliberate indifference. But, the official is not liable if they "merely 'should have known' of a risk" (*Converse,* p 775). The court stated that officials are entitled to qualified immunity unless their conduct violates a "clearly established [statutory or] constitutional right" (*Converse*, p 774, and *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003), p 623). To overcome qualified immunity, a plaintiff must demonstrate that "every reasonable official would have understood that what he is doing violates that right" (*Est. of Bonilla v. Orange Cnty.*, 982 F.3d 298 (5th Cir. 2020, p 306, quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011), p 741).

In *Edmiston*, the Fifth Circuit noted the plaintiffs' allegations that the jail officials did not provide Mr. Schubert with a mental disabilities and suicide screening on admission as required by the Texas Commission on Jail Standards (TCJS) (37 Tex. Admin Code § 273.5 (2013)), and that there had been a prior suicide at the same jail. In response, the court stated, "there is no independent constitutional right to suicide screening" (*Edmiston*, p 560), citing the Supreme Court's precedent that "no decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols" or "even discusses suicide screening or prevention protocols" (*Taylor v. Barkes*, 575 U.S. 822 (2015), p 826). According to the Fifth Circuit, even if the plaintiffs could assert a right to screening, deliberate indifference on the part of the officials would still require that they have subjective knowledge of Mr. Schubert's suicide risk.

The court analyzed each defendant's right to qualified immunity based on whether they had the requisite subjective knowledge. The court cited precedents explaining the standard for subjective knowledge based on evidence such as a witnessed suicide attempt (*Cope v. Cogdill,* 3 F.4th 198 (5th Cir. 2021)), hearing an individual make suicidal statements (*Converse,* p 776), or knowing that an individual had depression and that collateral information indicated the individual was suicidal (*Hyatt v. Thomas*, 843 F.3d 172 (5th Cir. 2016)). The court found that while Mr. Borrego, Sheriff Carrillo, and Deputy Melendez all knew Mr. Schubert had repeatedly expressed that someone was trying to kill him, there was no evidence he had behaved or spoken in a way indicating he was suicidal or at risk of self-harm. The court also concluded that knowing Mr. Schubert had a history of drug use and being in a halfway house would not have clearly led officials to infer that Mr. Schubert was at risk of suicide.

The court ruled the plaintiffs did not demonstrate the defendant officials had subjective knowledge that Mr. Schubert posed a substantial risk of suicide. The

court held that the three officials were entitled to qualified immunity. Whether they responded with deliberate indifference was therefore not a concern. The lower court's ruling was vacated, and the defendants' motion to dismiss the failure-to-protect claims was granted.

### Discussion

This decision is a reminder for forensic psychiatrists to understand the applicable standards in a specific jurisdiction (from both statute and case law) when asked to assess deliberate indifference by custody officials. Carceral facilities have a responsibility to ensure that detainees' basic human needs are met. This includes making sure that detainees have access to adequate medical and mental health care. Unless appropriately assessed, detainees with mental disorders are at risk of these problems' (including self-harm ideation) going undetected. The ruling in *Edmiston* utilized a "reasonable official" standard for determining whether a detainee's suicide risk is elevated and requires a custody official to take mitigating action. The court reiterated that for claims of deliberate indifference in jail suicide prevention, the "reasonable official" standard is a subjective one.

The Fifth Circuit acknowledged that the TCJS specifies that inmates must have mental health and suicide prevention screening on admission. The court also noted that the TCJS had cited the jail (both before and after Mr. Schubert's death) for violating requirements for intake screening and suicide prevention training. But, while the Fifth Circuit stated that the defense of qualified immunity is overcome if an inmate's constitutional or statutory rights are violated, the court held there is not a constitutional right to suicide screening. Therefore, the court has distinguished between suicide prevention and other services that are constitutionally required in a carceral setting. Specifically, the Fifth Circuit appears to have determined that jail officials are not necessarily required to assess at intake whether or not an inmate has suicidal thoughts, plans, or intent.

This ruling could have substantial impacts on suicide screening as well as suicide prevention efforts in carceral settings. By emphasizing a subjective standard for deliberate indifference and discounting the guidelines set forth by the TCJS, the ruling creates a tension between efforts to improve suicide prevention strategies and officials' interest in preserving the defense of qualified immunity. For instance, the Texas Administrative Code requires jails to provide training to staff regarding mental health and suicide prevention. Such training would position staff to better recognize inmates at risk of suicide and to intervene to reduce such risk. But, an official who participates in such training and does not follow the guidance could be at greater risk for claims of deliberate indifference. Moreover, one might argue that the knowledge gained from such training could limit one's ability to employ a qualified immunity defense against such claims. Resolution of this tension to improve care in carceral settings will require collaboration between courts, clinicians, and regulatory bodies.

# Statutory Compliance in Petitions for Involuntary Treatment

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## Petitions for Involuntary Treatment Shall Include Statutorily Required Information

DOI:10.29158/JAAPL.240029-24

**Key words:** court-ordered involuntary treatment; civil commitment; statutory compliance; physician affidavit

In *In Re Pima County Mental Health, No. 20200860221*, 533 P.3d 951 (Ariz. 2023), the Supreme Court of Arizona considered whether in a petition for court-ordered treatment, the affidavits filed by two physicians containing generic information without any details specific to the patient met statutory compliance. The Arizona Court of Appeals had vacated the treatment order because the physicians' affidavits failed to comply with the statute. The Arizona Supreme Court reversed. Although the physicians' affidavits and attachments did not comply with the statute, the court ruled that there was no prejudicial error in this case.

### Facts of the Case

In February 2021, G.B., a 70-year-old female weighing around 83 pounds, was evaluated at St. Mary's Hospital in Arizona for gastrointestinal complaints. She was diagnosed with delusional disorder, malnutrition, and cachexia. G.B. thought the doctors were trying to harm her, and she insisted on being discharged. An application for an involuntary evaluation of G.B., alleging that she was "Persistently or Acutely Disabled (PAD)," was filed by the hospital. A prepetition screening evaluation and report concluded that PAD standards were met, and the involuntary evaluation process should proceed. Subsequently, a petition for court-ordered evaluation of G.B. was filed and an order for evaluation was issued by the superior court. Pursuant to that order, G.B. was transferred to an inpatient psychiatric unit at University Medical Center South ("Banner"). At Banner, two psychiatrists, Dr. Madan and Dr. Colon, evaluated G.B. and Banner then filed a petition for court-ordered treatment.

The hospital attached to the petition two sets of three stapled-together documents, one set for each doctor. Included in the set were two generic signed and sworn fill-in-the-blank type forms with boilerplate language titled "Physician Affidavit" and "Addendum No. 1 - Persistently or Acutely Disabled" (*Pima County*, p 954). These forms referenced G.B. as the patient but did not discuss any specific examinations or evaluations conducted by the physicians, nor did they refer to any attached addenda, reports, or evaluations. Also included was a third document titled "Final Report," that contained the physicians' notes and findings of their evaluation of G.B.

At the petition hearing, G.B.'s counsel did not object to the admission of the affidavits, addenda, and final reports. Subsequently, the trial court found G.B. to be PAD and ordered treatment. G.B. then appealed, challenging the sufficiency of the physicians' documentation. Banner contended that the stapled-together documents fulfilled statutory requirements for the petition for treatment as stated in Ariz. Rev. Stat. § 36-533(B) (2022). In a split decision, the appellate court vacated the trial court's order with the majority finding that strict statutory compliance was required for involuntary treatment proceedings. The court noted that the affidavits of the two physicians failed to comply with the statute based on the lack of a personalized discussion of G.B. to support their conclusion of PAD due to mental illness. The appellate court also assumed but did not conclude that the stapled addenda to the physicians' affidavits were part of the statutorily required affidavits.

### Ruling and Reasoning

The Supreme Court of Arizona noted that G.B.'s case was moot because G.B. was no longer subject to the court's order. But, the court made an exception to review the case on grounds of public importance because of the likelihood of repetition at the state level and the liberty interests inherent to court-ordered involuntary treatment. The court first delineated the requirements of Ariz. Rev. Stat. § 36-533(B) (2022), which governs the petition for court-ordered treatment. The statute requires that two physicians must assess the patient and provide affidavits. These affidavits must contain details and evidence supporting the physicians' conclusions based on their observation and study of the patient's history, a summary of facts supporting their conclusion, and relevant patient exam information. The court then addressed the wording of the statute and guidance on compliance. The court noted that by using the word "shall" in reference to providing the necessary materials outlined in the statutory requirements, §36-533(B) makes compliance mandatory. In addition, the court highlighted that case law had suggested "strict compliance" in cases of involuntary treatment proceedings because of the serious deprivation of liberty involved. But, the court clarified that it did not favor "strict compliance" to be applied in the mental health setting. Instead, the court said that "complete compliance" of each statutory requirement is more appropriate since it allows for technical differences but not errors in compliance.

The court ruled that the physicians' affidavits in G.B.'s case did not comply with the statutory requirements as they lacked personalized information about G.B., including the physicians' detailed findings from her assessment and medical history, as required by statute. In addition, the court found that the addenda, although satisfying the statute by means of details contained, were nevertheless also insufficient because they were unsworn and not incorporated in the physicians' affidavits by reference. Being unsworn, the court noted, the additional documents were not affidavits themselves, and could not be included within affidavits without a reference. Although Arizona does not have case law on courts using documents attached to affidavits if they are included by reference in deciding a petition for involuntary treatment, the court noted that Arizona has

established this use in other cases, such as with contracts and warrants. Additionally, the court noted that other state courts recognize incorporation by reference when considering a petition for involuntary treatment. Thus, the court said that if extrinsic documents are expressly referenced and are physically attached to the referencing affidavit, they are considered as incorporated into a § 36-533(B) affidavit and, accordingly, meet statutory requirements. The court underscored, however, that it remains best practice to provide all the statutorily required information in the affidavit itself to aid efficiency. With this, the court looked at whether G.B. waived the matter of statutory compliance and found that she did, since G.B.'s attorney did not object to any statutory deficiency either in a pretrial motion or during the hearing. Moreover, the court noted that had G.B. brought up her concerns with the documentation in the trial court, the deficiencies would have been corrected.

Finally, the Supreme Court of Arizona assessed whether a fundamental error had been committed by the trial court in admitting the insufficient affidavits tendered by the hospital, since only the commission of a fundamental error would be grounds for overturning the trial court's decision. The court explained that a fundamental error goes to the foundation of the case and is prejudicial, deprives one of a right essential to one's defense and is prejudicial, or precludes the possibility of a fair trial. The court did not find convincing evidence of prejudice against G.B. or her case. G.B. was able to fairly oppose the petition for involuntary treatment by cross-examining Dr. Madan and presenting her own witnesses. In addition, the court noted that the trial court had enough evidence to support its ruling despite the deficiencies in the affidavits. The court found that the acceptance of the physicians' insufficient affidavits was not a prejudicial error and did not prevent G.B. from having a fair trial. Subsequently, the Supreme Court of Arizona vacated the court of appeals' opinion and affirmed the trial court's order.

### Discussion

There are widespread differences in the way hospitals satisfy statutory requirements for civil commitment petitions. Many hospitals routinely do not provide all statutorily required information in the affidavits themselves and instead provide supplemental materials. The Supreme Court of Arizona took this into consideration in rendering its opinion. Here, the Supreme Court of Arizona emphasized the significant liberty interest at stake when hospitals are petitioning for court-ordered treatment. The court indicated that physicians and hospitals do not have license to overlook statutorily required documentation and the standards for provision of this information. Thus, the court allowed for only a degree of error in submitting the documents, underscoring that any further deviation from the statutory requirements, especially due to carelessness, was unacceptable.

This legal opinion highlights the need for incorporating the teaching of fundamental topics in forensic psychiatry to residents during the formative years of their training. Statutory requirements related to documentation for civil commitment and related matters should be required knowledge, since proper documentation emphasized and taught during residency training would likely reduce such errors in a clinician's practice later in life. Moreover, in cases where a physician might be faced with a malpractice lawsuit because of an adverse outcome, poor documentation could potentially create grounds for additional liability.

## Competency for Self-Representation

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### Defendants May Self-Represent When They Are Competent to Stand Trial and Their Waiver is Made Knowingly and Voluntarily, Even If This Waiver is Made Constructively

DOI:10.29158/JAAPL.240029L1-24

**Key words:** competency to stand trial; competency to waive counsel; constructive waiver of counsel; expert testimony

In *United States v. Nichols,* 77 F.4th 490 (7th Cir. 2023), Samuel Nichols appealed his sentence of life imprisonment, arguing that he was not competent to proceed *pro se*, his waiver of counsel was not knowing and voluntary, and the court inappropriately applied sentencing guidelines. The Seventh Circuit Court of Appeals affirmed the district court's finding that Mr.

Nichols was competent to proceed *pro se* and by dismissing his attorneys, he had constructively waived his right to counsel. The court held that even if a defendant does not waive counsel affirmatively, an unwillingness to work with counsel by a defendant deemed competent amounts to a constructive waiver.

### Facts of the Case

In December 2015, Mr. Nichols was charged with sex trafficking and was appointed two experienced attorneys. In September 2016, the relationship between the attorneys and Mr. Nichols began to break down when he asked them to file frivolous motions. By March 2017, he requested new counsel from the court. The court advised Mr. Nichols that he would not be getting new counsel, and if he did not want to proceed with the assigned counsel or did not obtain private counsel, he would be opting to proceed *pro se*. A month later, Mr. Nichols discharged his attorneys. The court confirmed his understanding that by discharging his attorneys, he would be proceeding without counsel.

In August 2017, while proceeding *pro se*, Mr. Nichols requested a competency evaluation. The district court ordered the evaluation and assigned Dr. Diana Goldstein to be the evaluator. After 14 hours of evaluating him, Dr. Goldstein opined that Mr. Nichols was competent to stand trial and to proceed *pro se* if he wished. She found no evidence of any significant psychiatric disorder. She noted his history of behavioral problems and learning difficulties but opined that these did not affect his ability to understand the proceedings. Mr. Nichols then requested a second evaluation, and Dr. Michael Fields was selected by standby counsel. Mr. Nichols was not cooperative with this second evaluation, so Dr. Fields was only able to complete a 90-minute interview without any testing. Dr. Fields opined that Mr. Nichols understood the proceedings and his competency was not affected by a severe emotional disorder, but it was "Dr. Fields's 'clinical sense' that Nichols' 'lack of willingness to work with legal counsel'" (*Nichols*, p 496) made him incompetent. During testimony, Dr. Fields conceded that "[b]eing unwilling is not the same as unable" (*Nichols*, p 497).

At a contested competency hearing, the government introduced recorded jail calls where Mr. Nichols spoke about his intention of delaying his trial and looking for loopholes to escape his charges. Both experts testified, and Mr. Nichols was found competent to stand trial. At trial in March 2018, Mr. Nichols was found guilty on all but one charge. He then accepted assistance of counsel and requested a third competency evaluation that could apply retroactively. The court allowed this evaluation but denied the retroactive application. He was again found competent and was sentenced to life in prison. He appealed, challenging the district court's ruling of his competence to proceed *pro se*, his waiver of his right to counsel, and the application of sentencing guidelines.

### Ruling and Reasoning

The Seventh Circuit Court of Appeals affirmed the district court's ruling that Mr. Nichols was competent to proceed to represent himself. Mr. Nichols argued that *Indiana v Edwards*, 554 U.S. 164 (2008) required the district court to determine whether he was competent to represent himself. The court found that Mr. Nichols was incorrect, as *Edwards* created a rule of permission, not a requirement. The court explained that under *Edwards*, "Courts may restrict a defendant's right to represent himself, if and only if, he falls into a 'gray area' of competence – where the defendant understands the proceedings against him but labors under serious delusions or suffers from otherwise debilitating mental infirmities" (*Nichols*, p 498). This narrow gray zone, the court elucidated, refers only to a person with mental illness "who cannot handle matters himself and who needs a lawyer almost in the capacity of a guardian." (*Nichols,* p 499, citing *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), p 845). The court found no evidence to support that Mr. Nichols experienced such delusions or was mentally ill. Of Dr. Fields' conclusion regarding Mr. Nichols' capacity to proceed, the court ruled that the vague "clinical sense" was not a legally cognizable standard since "an unwillingness to assist counsel is not an incapacity to do so" (*Nichols*, p 499).

The Seventh Circuit agreed with the district court's finding that Mr. Nichols constructively waived his right to counsel by refusing to work with appointed counsel and by filing frivolous *pro se* motions. The court concluded that he did not have the right to indefinite delays while he attempted to find a lawyer he would like to work with. The court recognized that Mr. Nichols did not actually desire to represent himself but noted that as he had been "given several options, and turn[ed] down all but

one, [he had] selected the one [he] didn't turn down" (*Nichols*, p 500).

In considering whether Mr. Nichols's waiver was intelligent, knowing, and voluntary, the court considered four factors: "(1) whether and to what extent the district court conducted a formal hearing into the defendant's decision to represent himself; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to waive his right to counsel" (*Nichols* p 501, citing *United States v. Cooper*, 591 F.3d 582 (7th Cir. 2010), p 587).

The court noted that although the district court did not hold a formal hearing under *Faretta v. California*, 422 U.S. 806 (1975), the district court made numerous efforts to assess whether his waiver was knowing and voluntary. These included multiple hearings to assess his waiver of counsel, assessment of his phone conversations and statements to Dr. Goldstein that showed he understood the risks of self-representation, evaluation of his extensive criminal justice history, and his statements that he would prefer to work for himself rather than let somebody else send him to jail. The court also noted that a waiver is likely knowing and voluntary if it is part of a defendant's strategy. The court added that Mr. Nichols "wanted to make baseless arguments rather than accept counsel's help" (*Nichols*, p 502) and he was looking to find loopholes as part of his strategy. Therefore, the court concluded that Mr. Nichols's waiver of counsel was intelligent, knowing, and voluntary and affirmed the district court's ruling.

### Discussion

*Nichols* demonstrates a point of tension between the right to counsel and the right to self-representation: that a defendant has a right to counsel but not a right to counsel of their choosing. This case also highlights the difference between a defendant affirmatively and constructively waiving their right to counsel. In an affirmative waiver, a defendant asserts the desire to proceed *pro se*. In a constructive waiver, as was the case for Mr. Nichols, a dismissal of counsel amounted to a default choice of self-representation.

Forensic psychiatrists are often called to evaluate a defendant's competency to proceed *pro se* and therefore must be familiar with the different ways a defendant can waive the right to counsel. As in *Nichols*, when a defendant constructively waives this right, an evaluation of competency to proceed *pro se* requires an assessment of whether the dismissal of counsel was made intelligently and knowingly. In contrast to affirmative waivers, a forensic psychiatrist evaluating the voluntariness of a constructive waiver may need to rely not only on a defendant's words, but also on the defendant's conduct. This case highlights a potential pitfall for forensic evaluators in these evaluations where a defendant's unwillingness to work with counsel could mistakenly be equated with an inability to work with counsel. Constructive waivers of the right to counsel represent a particular tension in the rights guaranteed to defendants by the Sixth and Fourteenth Amendments and pose a unique challenge for forensic psychiatrists called to evaluate competency for self-representation in those cases.

## Standard for Deliberate Indifference to Inmate Safety and Medical Needs

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### Prison Employees Are Protected by Qualified Immunity When Making Minimal but Good-Faith Efforts to Protect Inmate Safety and Medical Needs

DOI:10.29158/JAAPL.240030-24

**Key words:** deliberate indifference; qualified immunity; inmate safety; failure to protect; civil rights

In *King v. Riley*, 76 F.4th 259 (4th Cir. 2023), three deliberate indifference claims were raised following the murders of four inmates by two fellow prisoners. The Fourth Circuit Court of Appeals ruled there was no constitutional right for properly conducted security

checks, nor were prison officials required to deliver medical services in an emergency if they attempted to obtain services. The court determined prison officials were entitled to qualified immunity.

### Facts of the Case

John King was an inmate housed on the Immediate Care Services Unit (ICSU), a mental health ward of the Kirkland Correctional Facility in South Carolina. The unit held inmates with significant mental health difficulties that did not rise to the level of inpatient hospitalization. Inmates were employed as janitors, known as ward keepers. Ward keepers were recommended by mental health counselors and granted special privileges such as unit access and allowing peers in their cells.

In April 2017, two head ward keepers, Jacob Philip and Denver Simmons, lured Mr. King into Mr. Simmons's cell, strangled him, placed his body beneath the bed, and murdered three other inmates over the course of two and a half hours. On duty was Sergeant DeWaun McKan, who was required to conduct 30-minute security checks. He completed security checks but did not look inside the cells, despite training to do so. Thus, the murders went uninterrupted and undiscovered. Afterward, Mr. Philip and Mr. Simmons approached an administration building and suggested officers look in Mr. Simmons's cell. Sergeant McKan and Officer Damien Jones discovered the four bodies. Medical aid was requested but not personally administered.

Mr. King's estate sued Sergeant McKan and Officer Jones, their supervisors, and the warden and associate wardens at Kirkland, alleging correctional staff showed deliberate indifference to Mr. King's safety and need for medical intervention, violating his Eighth Amendment rights. Three deliberate indifference claims were raised. First, Sergeant McKan was deliberately indifferent to Mr. King's safety by failing to complete proper security checks. Second, Officer Jones and Sergeant McKan showed deliberate indifference to Mr. King's medical needs by requesting medical personnel but not personally administering care. Third, their immediate and extended supervisors were deliberately indifferent to Mr. King's safety under a theory of supervisory liability. The magistrate judge held the defendants were not deliberately indifferent and had qualified immunity on the three claims. Mr. King's estate appealed, and the matter was brought before the Fourth Circuit Court of Appeals.

### Ruling and Reasoning

Unless an official knowingly violated the Eighth Amendment, the official would be entitled to a two-pronged qualified immunity analysis when a deliberate indifference claim is raised. The two prongs are objective and subjective as articulated in *Farmer v. Brennan*, 511 U.S. 825 (1994). A significant risk of harm must be demonstrated to satisfy the objective prong. The subjective prong is concerned with whether prison officials were aware of the substantial risk and understood their response was insufficient. Thus, even if a prison official knew of the risk of harm, if the response was reasonable, the official cannot be held liable.

Regarding the first claim of deliberate indifference concerning failure to protect, Mr. King's estate asserted Sergeant McKan's conduct was constitutionally deficient because, despite allegedly knowing about the risk of inter-inmate violence, he did not visually inspect cells during rounds. The court noted that government workers who are sued as individuals are protected by qualified immunity. To surmount qualified immunity, a complainant must show a statutory or constitutional right was violated and that right was indisputable during the alleged incident. The Fourth Circuit determined there was no constitutional right dictating that Sergeant McKan look inside cells to reduce the risk of violence. Further, while Sergeant McKan was trained to look inside cells during security rounds, there was no institutional policy requiring this practice. Regardless, qualified immunity is concerned with the violations of "clearly established constitutional law" (*King*, p 268) not prison policy. Thus, Sergeant McKan was protected by qualified immunity.

Regarding the second claim related to medical needs, Mr. King's estate referenced four cases from other jurisdictions where prison officials were found deliberately indifferent for failing to provide first aid to unconscious or dead prisoners. They proposed these cases constituted a consensus that failure to provide medical aid was unconstitutional. The Fourth Circuit disagreed. Regarding the cases referenced, the court stated two of the cases were concerned with total failure to act, which is distinguishable from Mr. King's estate's claims. While the other two cases were similar to Mr. King's, the court stated two cases from other jurisdictions did not constitute consensus. The court ruled Sergeant McKan and Officer Jones put forth good-faith efforts to obtain medical assistance, thus negating deliberate indifference. Again, the officers did not violate a clearly established right and were thus entitled to qualified immunity.

Regarding the third claim connected to supervisory liability, Mr. King's estate alleged the officer's immediate supervisor, warden, and associate wardens all showed deliberate indifference within their supervisory roles. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court ruled government officials are only liable for their own misconduct, not for the unconstitutional conduct of their subordinates. Because the complaint did not contain specific allegations of each individual supervisor's conduct, this claim was rejected. On all three deliberate indifference claims, the Fourth Circuit affirmed the summary judgment rulings.

### Dissent

Regarding the failure-to-protect claim, the dissenting judge asserted Sergeant McKan knowingly failed to protect prisoners from inter-inmate violence and should not be entitled to qualified immunity. He said prison officials knew the nature of serious psychological problems experienced by inmates on the ICSU and that intensive monitoring was required by prison policy. Based on the nature of the unit and the prior violent offenses committed by the ward keepers involved, the dissent argued sufficient evidence existed to establish officials were aware of the risk of harm because of its obvious nature. Because Sergeant McKan admitted to knowingly conducting improper security checks, the dissent argued he was at minimum subjectively aware his actions were inadequate considering the risk. The majority was further criticized for not providing additional guidance regarding what would constitute an Eighth Amendment violation upon a prison official's dereliction of duty and for presenting officials with a future liability avoidance blueprint.

### Discussion

The current case repeatedly refers to *Farmer v. Brennan*. In *Farmer*, the Supreme Court said that for a violation of an inmate's Eighth Amendment rights to have occurred, prison officials must be deliberately indifferent to the conditions of incarceration, which pose a substantial risk of serious harm. Second, there must be evidence of a prison official's knowledge of the risk, which the Court indicated need not require that the prison employee believed harm would come to an inmate based on their action or inaction. Rather, it is enough for prison officials to have knowledge of the risk of serious harm and disregard that risk to be held accountable for their action or inaction. In *King*, the Fourth Circuit concluded that no claims met the standard for deliberate indifference, because of the failure to establish a constitutional right violation. Thus, Sergeant McKan and Officer Jones were protected by qualified immunity. This doctrine can afford government officials performing discretionary duties immunity from individual lawsuits when damage occurs.

In correctional settings, regardless of one's specific discipline, employees are correctional officers first and are thus responsible for maintaining the safety and security of the institution (Federal Mediation and Conciliation Services, In the Matter of the Arbitration between American Federation of Government Employees, Council of Prisons Locals Union and U.S. Department of Justice Federal Bureau of Prisons Employer, Opinion and Award, 2017). While conducting security checks may not typically fall under the purview of all correctional employees, the matter of deliberate indifference to medical needs is worth consideration. It is necessary for all correctional employees to consider the unique, environment-specific needs of a correctional setting, while maintaining awareness of their discipline-specific ethics. Individuals working within specific disciplines, such as medical personnel, psychologists, and social workers, may be called upon to provide some degree of medical care in a situation like the current case. For physicians, this is consistent with the American Medical Association (AMA) Code of Medical Ethics, which indicates that physicians can largely choose their patients and place of care except in emergencies. (American Medical Association. AMA principles of medical ethics. Opinion 1.1.2. 2016). It is important for all correctional employees, though, to consider personal safety as well as the safety and security of the facility. The findings in *King* indicate, at least within the Fourth Circuit's jurisdiction, that employees who make a good-faith effort to obtain medical assistance in an emergency will be protected by qualified immunity even if medical care is not personally delivered.

## Dismissal of Involuntary Treatment Petitions following the Violation of a Commitment Statute

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## Involuntary Treatment Orders Should Be Dismissed If the Requirements of a Commitment Statute Are Violated and Totally Disregarded

DOI:10.29158/JAAPL.240030L1-24

**Key words:** involuntary commitment; emergency detention; patient rights; statutory requirements; treatment act

In *In re Det. of A.C.*, 533 P.3d 81 (Wash. 2023), the Supreme Court of Washington ruled a petition for involuntary commitment should be dismissed when the requirements of the state's involuntary treatment act are disregarded. Moreover, it was asserted in circumstances where a patient's rights under the act were "plainly violated," appropriate remedies should be implemented.

### Facts of the Case

In 1973, Washington State passed the Involuntary Treatment Act (ITA), providing a statutory framework for crisis responders to investigate, evaluate, detain, and commit individuals experiencing acute psychiatric symptoms. Individuals can be involuntarily treated without judicial oversight if their symptoms present a serious risk of harm or grave disability. Following this brief emergency detention, if the risk persists, a petition for involuntary treatment must be filed and the court must conduct a hearing to rule on an additional 14-day commitment. If stabilization is not attained, the court may order a consecutive 180-day commitment.

The present case involves three patients, identified as NG, CM, and AC. NG and CM were involuntarily hospitalized at Western State Hospital (WSH) under 180-day commitment orders. Although NG's commitment order expired because of a technological oversight, WSH held NG for over one month after the expiration. Similarly, CM was detained more than one month past the commitment's expiration. Although staff prepared an additional 180-day petition for CM's commitment, they failed to file because of a technical problem. When staff became aware of NG's and CM's expired orders, they reinitiated the ITA procedures; both patients were subsequently placed in emergency custody following evaluations. Shortly after, WSH filed new 14-day petitions to continue detaining NG and CM.

Both NG and CM moved to dismiss the petitions claiming the ITA's requirements were disregarded and violated. For NG, the state successfully argued the legislature would have not intended dismissal of her case, given how "gravely disabled" she was, and the case was not dismissed. NG appealed this denial and the order granting the ITA petition. In CM's case, a county commissioner granted the motion to dismiss after the state unpersuasively argued the legislature did not intend dismissal of the petition.

AC was placed under a 14-day commitment at Telecare North Sound Evaluation and Treatment Center. During this hospitalization, AC invoked her right to not be medicated 24 hours before her upcoming court hearing; however, she was involuntarily medicated within that time frame. The judge continued the hearing for 24 hours after learning AC had been involuntarily medicated, extending the commitment. AC moved to have the ITA petition dismissed claiming her rights under the ITA were violated by continuing her commitment, but this was denied as the court concluded the state's interest in reaching the merits of the petition outweighed any violations of the ITA. Division One of the Court of Appeals affirmed the decision on appeal.

NG's and CM's cases were consolidated and heard by Division Two. The state argued that dismissal of new petitions in response to the commitment orders' expiring was not an appropriate remedy. Division Two held that dismissal of a new 14-day petition for involuntary treatment is acceptable when a committed person is improperly detained beyond the expiration of an involuntary commitment order and the ITA's requirements have been totally disregarded. Together, AC, MG, and CM sought review, which was granted by the Supreme Court of Washington.

### Ruling and Reasoning

The Supreme Court of Washington ruled that if the requirements of the ITA are totally disregarded, the petition must be dismissed. But not every violation necessitates a dismissal. The court reviewed all three

cases to determine if there was a total disregard for the statutory requirements and if the trial courts properly applied the law. The decision relied heavily on the holding from *In re Det. of Swanson*, 804 P.2d 1 (Wash. 1990), another case that addressed the ITA statutory requirements. The court in *Swanson* said that the goals of "continuity of care and protecting the public are decidedly not met if dismissal of properly filed and properly supported petitions turns on [things other] than on the court's determination of whether or not legal grounds for commitment exist" (*Swanson*, p 5).

The court must decide if there are legal grounds for a commitment based on legislative intent, including protecting both the patient and public, prevention of inappropriate and indefinite commitments, implementing prompt evaluation and treatment for those with behavioral health disorders, safeguarding patient rights, and ensuring care continuity for those with behavioral health disorders.

The court considered how neither "totally" nor "disregarded" are defined in the ITA. Considering common definitions of these words, it was concluded the ITA is totally disregarded when a person is involuntarily detained without legal authority set forth by the act. As the ITA noted, a person must be released once the order authorizing their detention expires, and NG and CM should have been released before new proceedings were initiated, afforded an attorney, and brought before a judge to reinstitute the commitment. Initiation of new proceedings while a person is still involuntarily detained under an expired court order is not permitted by the ITA and is not a remedy for disregard of the ITA requirements. Moreover, it would have been appropriate for NG and CM to be released into the community prior to a new evaluation. The court ruled that NG's and CM's rights were totally disregarded, and the new petitions should have been dismissed.

In the case of AC, the court determined her rights under the ITA were plainly violated but not totally disregarded. It was noted the trial court acted quickly to address the violation and detainment was under authority of the law. Focusing on the merits of the petition, the trial court did not abuse its discretion in denying her motion to dismiss.

### Dissent

The dissent suggested that interpreting total disregard needs to be considered with the totality of circumstances constituting the alleged violation. According to the dissent, in all three of the petitioners' cases, the requirements of the ITA were not totally disregarded, and dismissal was not an appropriate remedy.

### Discussion

*In re AC* provides guidance on what it means to totally disregard the requirements of Washington's ITA and, if the ITA is violated, what constitutes appropriate remedies. These matters were previously raised in *In re Det. of C.W.*, 53 P.3d 979 (Wash. 2002) and *Swanson*. Given a lack of definition of total disregard in the ITA, the court relied on use of common definitions as provided in the Merriam-Webster dictionary. The court acknowledged the legal interpretation of these words can vary by the context.

*In re Det. of AC* brings to light the intricacies of semantics within the law and how varying interpretations can depend on select words. This matter becomes more complex when interpretations may differ in legal and clinical settings. For instance, clerical oversights or errors led to the ITA's being "totally disregarded" and a dismissal of a commitment petition. But, in a clinical context, providers must consider the implications of failing to provide mental health services for patients who are psychiatrically unstable. Providers are obligated, by their professional associations and licensing boards, to deliver ethical, empirically based care. For instance, the ethical guidelines of the American Psychological Association states that providers must avoid interruption of psychological services whenever possible (American Psychological Association. Ethical principles of psychologists and code of conduct. 2017). Similarly, The American Psychiatric Association's Principles of Medical Ethics (2013) highlights the importance of responsibility for patient care overlaid with community and public health. Although there were technical violations of the ITA, once known, it would have been unethical for providers to totally disregard their professional obligations and recommend patients who demonstrated a "serious risk of mortality" and "violent and assaultive" behavior be released, as was the case for NG and CM

*In re Det. of AC* highlights how interpretation of the law may be at odds with clinical practice, but also how legal remedies that fail to consider a patient's circumstances may be clinically contraindicated. It is

prudent for clinicians to be aware of the requirements in law. When there are competing interests, clinicians may be able to clearly explain, based on a clinical justification, the rationale for continued detention. To ameliorate the inconsistencies between the legal and clinical professions, it is useful to engage in interdisciplinary consultation to improve how the law is applied to clinical matters and understanding of operational definitions within statutes and interpretive case law.

# Standard of Proof for Residential Placement of Minor in State's Custody

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## Court Proceeded Appropriately during Placement Hearing Involving Native American Child

DOI:10.29158/JAAPL.240031-24

**Key words:** residential placement; foster care; Native American

In *Tuluksak Native Community v. Department of Health and Human Services*, 530 P.3d 359 (Alaska 2023), the Alaska Supreme Court held that the Office of Children's Services (OCS), under Alaska Stat. § 47.10.087 (2020), was authorized to place a child in an out-of-state residential psychiatric treatment facility using the clear and convincing standard. Additionally, the lower court did not plainly err in failing to consider the Indian Child Welfare Act's (ICWA) placement preferences.

### Facts of the Case

In 2021, OCS filed an emergency petition for temporary custody of Hanson N. (a pseudonym adopted by the court), a 15-year-old boy from Tuluksak, Alaska, and member of the Tuluksak Native Community (also referred to as the Tribe). He was subsequently removed from his mother's care and placed in the care of an extended relative. Several months later, Hanson presented voluntarily to an emergency room and was admitted to North Star Behavioral Hospital without involvement of OCS or the court. The reason for admission was that Hanson "had some sort of incident. . . took a rope and tied it around his neck" (*Tuluksak*, p 363). OCS then requested an Alaska Stat. § 47.10.087 review hearing. A statewide injunction required this judicial hearing within 30 days. Alaska Stat. § 47.10.087 allows a court to authorize OCS to place a child in its custody into a secure residential psychiatric treatment center if certain statutory conditions are met. It requires showing that the child is "gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person" and that "there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment" (Alaska Stat. § 47.10.087).

Neither Hanson nor his attorney were present at the initial hearing. Tuluksak Native Community filed a response to OCS's hearing request questioning whether the statute applied because Hanson had been voluntarily admitted to North Star. The Tribe also raised arguments regarding discovery and requested a continuance.

Over the objection of the Tribe, the court proceeded with the hearing. OCS called Mr. Sabo, one of Hanson's treatment providers at North Star who testified about Hanson's condition. OCS argued that there was clear and convincing evidence that Hanson experienced a "mental illness," was dangerous to himself and needed placement exceeding 30 days. The court found that Hanson met criteria for placement under Alaska Stat. § 47.10.087. Three further hearings were held. During the second hearing, neither Hanson nor his attorney were present, so the court did not proceed. At the third hearing, Hanson's attorney appeared but stated they were not ready to proceed and reported that Hanson did not want to be moved out of state. At the final hearing, Hanson and his attorney were present. OCS notified the court that they were seeking Hanson's placement at an out-of-state residential facility. Mr. Sabo testified again, describing Hanson's mental illness, threats to others, and suicidal statements. He stated that Hanson needed long-term psychiatric care. OCS called a nurse consultant, John Luchansky, to testify about the proposed placement for Hanson. Mr. Luchansky testified that Hanson was accepted at two of nine facilities North Star had applied to, in Texas and Utah. Mr.

Luchansky testified that OCS looked for treatment facilities which accepted Alaska Medicaid. Mr. Luchansky was not aware if Indian Health Services maintained a list of "tribally affiliated" facilities. At the conclusion of the hearing, the court found that OCS had "barely met its burden" regarding statutory placement criteria (*Tuluksak*, p 367) but that Hanson could be placed out of state with review hearings held every 30 days.

The Tribe appealed the placement decision, raising several points: the application of Alaska Stat. § 47.10.087 to this case was unconstitutional; the court erred by applying the incorrect standard of proof; and the court erred by placing Hanson at a secure residential treatment facility without making appropriate findings under the ICWA or Alaska law. The Tribe raised other constitutional arguments, but the court did not consider them.

### Ruling and Reasoning

First, the Alaska Supreme Court held that OCS was correct to proceed under Alaska Stat. § 47.10.087 to seek placement for a minor in its care. The court cited its recent decision in *In re Hospitalization of April S.*, 499 P.3d 1011 (Alaska 2021). In this case, a minor in OCS custody was hospitalized for a mental health evaluation. At the 30-day commitment hearing, the superior court held that the first 30 days of the minor's hospitalization were voluntary under Alaska Stat. § 47.30.690 (2022), a statute that allows a child to be admitted to a treatment facility if the parent or guardian signs admission paperwork. But, the Alaska Supreme Court reversed, holding that OCS did not qualify as a parent or guardian, and that OCS cannot voluntarily commit minors in its care. Rather, OCS has the option to pursue an involuntary commitment or seek placement in a secure residential treatment facility under Alaska Stat. § 47.10.087. Therefore, in Hanson's case, proceeding under Alaska Stat. § 47.10.087 was appropriate.

Second, the Alaska Supreme Court held that the lower court did apply the correct standard of proof at the .087 hearing. Notably, Alaska Stat. § 47.10.087 does not explicitly identify the applicable standard of proof. The Tribe argued that because the court described the evidence presented as "barely" meeting the standards in Alaska Stat. § 47.10.087, the court must have assumed the appropriate standard of proof was preponderance of the evidence. The Alaska Supreme Court did not agree and stated that a clear and convincing standard was appropriate for the involuntary commitment of a minor. The trial court met this standard by considering Mr. Sabo's testimony and concluding that a residential facility was the best placement for Hanson. The court noted that placing a minor in a psychiatric facility "implicates protected liberty interests to such a degree that a lesser standard would not be appropriate" (*Tuluksak*, p 373).

Third, the state supreme court held that the lower court's failure to explicitly apply ICWA placement preferences was not plain error but that the court should always consider these preferences when placing Native children in foster care in residential facilities. Section 1915(b) of the ICWA emphasizes that Native children should be placed in "reasonable proximity" to their home, with preference for placement at Native-approved institutions. Placing a Native American child at a secure residential psychiatric facility is considered a foster care placement, and the court stated that an .087 hearing involves the placement preferences outlined by the ICWA. Importantly, no party directly raised an ICWA argument before the trial court or objected to the placement of Hanson on ICWA grounds. The court noted that limited treatment facilities were available, tribally affiliated or not, that were able to meet Hanson's treatment needs. The court observed that although the trial court record did not identify tribally run facilities that may have been appropriate for Hanson, it was not obvious that the failure to do so was prejudicial or would have changed the outcome of Hanson's placement.

### Discussion

*Addington v. Texas*, 441 U.S. 418 (1979), established clear and convincing evidence as the most appropriate standard of proof in civil commitment proceedings, to balance a state's interests with individual liberty rights. *Parham v. J.R.*, 442 U.S. 584 (1979), discussed that, like adults, minors have significant liberty interests at stake when committed for psychiatric treatment. But *Parham* did not require the same legal protections as *Addington*, in part because of the presumption that guardians will act in their child's best interest when seeking psychiatric hospitalization. But, placing a minor in state custody in a secure residential placement may implicate more substantial liberty concerns. For example, the Florida Supreme Court, in *The Department of Children and Family Services v. J.W.,* 890 So. 2d 337 (Fla. Dist. Ct.

App. 2004), held that "the proper standard of proof in proceedings for the involuntary commitment of a dependent child to a residential mental health facility is clear and convincing evidence" (*J.W.*, p 340). Alaska joins these states in applying this standard. *Tuluksak* also highlights the role of mental health treatment providers in these placement hearings, and the court's reliance on their testimony to identify least restrictive placement alternatives.

Finally, *Tuluksak* highlights the importance of recognizing the potential implications of the ICWA and the effects it may have on a Native American minor's psychiatric placement. Removal of Native American children from their families of origin can result in feelings of isolation and threaten their cultural identity (Wills C, Norris D. Custodial evaluations of Native American families: Implications for forensic psychiatrists. J Am Acad Psychiatry Law. 2010 Dec; 38:540-6). When making placement decisions for Native children, it is imperative to use the provisions of the ICWA to ensure that placements prioritize the child's connection to their tribal community and heritage. Forensic psychiatrists can serve as advocates for the incorporation of the ICWA placement preferences.

# Trial Courts Can Reject Unrebutted Expert Opinion

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DOI:10.29158/JAAPL.240031L1-24

**Key words:** posttraumatic stress disorder; expert testimony; dual agency

In *Menard v. State*, 291 A.3d 1025 (Conn. 2023) the Connecticut Supreme Court held that the trial court's rejection of expert testimony about a diagnosis of posttraumatic stress disorder (PTSD) was acceptable and not arbitrary in part because the expert witness failed to independently assess the credibility of the plaintiffs' reports of PTSD symptoms.

### Facts of the Case

Connecticut state troopers Scott Menard, Darren Connolly, and Robert Zdorjeski sustained injuries during a traffic stop when an intoxicated driver collided with one of their police cruisers. The collision resulted in the parked vehicle making physical contact with the troopers. They were ambulatory after the accident and transported for medical evaluation. The troopers filed separate but nearly identical complaints against the state of Connecticut, alleging that they sustained physical injuries during the accident and that they were entitled to underinsured motorist benefits from the state. In addition, they alleged that because of the accident, they had PTSD.

The troopers' cases were consolidated for trial. At the trial, each trooper testified that the accident affected them physically and mentally, reducing their ability to fulfill employment obligations. They also presented medical evidence of treatment and assessment from a licensed professional counselor, Jennifer Honen. Ms. Honen was both the expert witness in the case and the treating clinician for the troopers. She testified that she diagnosed the troopers with PTSD. She was asked how she evaluated for malingering. She explained she would consider malingering only if there were subjective "red flags" such as "odd. . . personality or character strategy. . . or different reports. . . of stormy and short relationships. . . a characterological disorder" (*Menard*, p 1034). She testified that she presumed the troopers' reports of PTSD symptoms were truthful in part because of an absence of these red flags. Ms. Honen was also aware of psychological tests for malingering but stated that she did not administer them because she was not a psychologist. She stated that she assumed that the troopers' descriptions of their symptoms were truthful. She did not testify about factors that weighed against malingering.

The trial court issued a joint memorandum of decision, determining that the troopers should be awarded limited damages, but the sum was only a fraction of what was sought. The court concluded that damages for PTSD were not compensable under the uninsured or underinsured motorist statute (UM and UIM), which allowed damages for "bodily injury" (Conn. Gen. Stat. Ann. §§ 38a-336a(1)(A), 38a-336 (a)(2) (2022). The court noted that the troopers'

PTSD stemmed from a psychological and not a physical injury, so did not qualify as a bodily injury. The court also did not find Ms. Honen's forensic evaluation sufficiently credible to establish a diagnosis of PTSD.

The troppers contended that Ms. Honen's diagnosis of PTSD relied both on their reporting of symptoms and her clinical observations during treatment. The court rejected the troppers' arguments, observing that their treatment notes "almost exclusively recounted symptoms" reported by the troppers rather than objective observations of signs or symptoms.

That all three plaintiffs had the same diagnosis was also questioned on cross-examination. Ms. Honen explained that people can withstand a certain amount of trauma before it becomes pathological. She was unable to adequately address how all three troopers reached their maximum capacity for processing trauma at the same time from the same event. Ms. Honen was also unaware of inconsistencies between the troopers' report and factual circumstances. For example, she was unaware that Mr. Connolly's report of having been run over by a car was factually inaccurate.

Mr. Menard and Mr. Connolly filed a motion to reconsider and for *additur*, challenging the trial court's conclusion that they were not entitled to recover damages for PTSD. Mr. Zdrojeski withdrew from the appeal. The appeals court rejected the troopers' arguments, agreeing with the lower court's decision that there was no coverage for PTSD claims under the statute. It did not address the rejection of expert testimony regarding the PTSD diagnosis. The plaintiffs appealed to the Connecticut Supreme Court, contending that the trial court's rejection of Ms. Honen's expert opinion was impermissibly arbitrary because her testimony was unrebutted and also supported by the record.

### Ruling and Reasoning

The Connecticut Supreme Court concluded that the troopers' liability claims failed on grounds of "evidentiary insufficiency" because neither the testimony by Ms. Honen nor the diagnosis of PTSD was credible, and the trial court did not err in rejecting her testimony. The court emphasized that the fact finder "may accept or reject, in whole or in part" uncontradicted expert testimony (*Menard,* p 1035). The court pointed to several cases, including *State v. Weathers*, 260 A.3d 440 (Conn. 2021), which laid out factors for the trier of fact to consider when determining credibility, including the expertise of the witness, the opportunity to observe the evaluee, the thoroughness of the evaluation, and the reasonableness of the judgments made. Thus, the court concluded that the fact finder's rejection of Ms. Honen's testimony was not arbitrary as there was sufficient "basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief" (*Menard,* p 1035).

Ms. Honen's failure to independently assess the truthfulness of the troopers' reports of PTSD symptoms or assess for malingering made her testimony less credible. Furthermore, the court stated that "it may well be standard practice for therapists to presume the truthfulness of their patients' reporting of PTSD symptoms for treatment purposes" but "such an assumption is not sufficient for purposes of a forensic assessment" (*Menard,* p 1035). The court described how an expert witness should consider other diagnoses and how malingering could be ruled out.

Furthermore, the Connecticut Supreme Court was not obligated to address the relationship of PTSD manifesting in physical form, which could potentially qualify the plaintiffs for UM and UIM as a form of "bodily injury." The case was affirmed in part, reversed in part, and remanded.

### Discussion

The *Menard* decision emphasized that the trier of fact has wide latitude in determining the credibility of expert testimony, including whether the methodology experts use to come to their opinion is reliable. The court points out, however, that this discretion is not boundless, and such testimony cannot be rejected arbitrarily. The court opined that there must be "some basis in the record" (*Menard*, p 1035) to support the conclusion that the expert testimony is "unworthy of belief." In this case, there was sufficient basis in the trial court record to reject the expert witness's testimony, despite it's being unrebutted.

This case also demonstrates the important difference between a mental health assessment for treatment and a forensic evaluation. Rates of malingering are estimated to be as high as 20 to 30 percent in personal injury claims for PTSD (Taylor S, Frueh BC, Asmundson GJ. Detection and management of malingering in people presenting for treatment of posttraumatic stress disorder: methods, obstacles, and recommendations. J Anxiety Disord. 2007; 21:22-41). The subjective nature of PTSD can make

detection of false symptoms, including misattributed or factitious symptoms, more difficult. A forensic evaluator should follow a systematic approach to consider and rule out false PTSD in these cases (Matto, M, McNiel DE, Binder, RL. A systematic approach to the detection of false PTSD. J Am Acad Psychiatry Law. 2019 Aug; 47(3):325-34). This includes gathering the patient's report of symptoms and the traumatic event as well as collateral information, such as treatment records and third-party interviews, and conducting psychological testing (Glancy GD, Ash P, Bath EP, *et al.* AAPL practice guideline for the forensic assessment. J Am Acad Psychiatry Law. 2015 Jun; 43(2 Suppl):S3-53).

The *Menard* case also highlights the problem of dual agency, where the treating clinician also serves as an expert witness. Some reasons to avoid dual agency are that it may adversely affect the therapeutic relationship, affect countertransference, and impede objectivity in forensic opinions and testimony. This form of dual agency should generally be avoided, if possible, as outlined in the AAPL Ethics Guidelines for the Practice of Forensic Psychiatry (https://www.aapl.org/ethics.htm).