

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

Jessica Anderson, DO
Resident in General Psychiatry
Prisma Health Midlands

Kaustubh G. Joshi, MD
Professor of Clinical Psychiatry
Associate Director, Forensic Psychiatric Fellowship

Department of Neuropsychiatry and Behavioral Science
University of South Carolina School of Medicine
Columbia, South Carolina

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.240025LI-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

Michael A. MacKay, DO
Fellow in Forensic Psychiatry

Robert L. Weisman, DO
Professor of Psychiatry
Director, Forensic Psychiatry Fellowship

Department of Psychiatry
University of Rochester Medical Center
Rochester, New York

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