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.