

As is central to this case, the insanity defense and applicable criminal statutes vary by state. The Court's ruling in *McElrath* serves as an important precedent, particularly in states that recognize a verdict of not guilty by reason of insanity. This ruling provides further protections to a marginalized and vulnerable population, those with mental illnesses who were found not guilty by reason of insanity, by barring their retrial on charges for which they have been acquitted despite variations in state law. According to this ruling, once an acquittal is rendered, it is final on that specific charge, regardless of the type of acquittal, the rationale of the jury, or any conflicting verdicts. For Mr. McElrath, the not guilty by reason of insanity adjudication constitutes the acquittal necessary for protection under the Double Jeopardy Clause with the potential for the other charges to be retried.

## Revocation of Pretrial Release in the Context of Escalating Suicide and Violence Risk

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### Court Recognizes Role for Procedural Protections Before Revocation of Pretrial Release

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**Key words:** Bail Reform Act; pretrial release; suicide risk; violence risk

In *U.S. v. Storme*, 83 F.4th 1078 (7th Cir. 2023), the Seventh Circuit Court of Appeals affirmed the revocation of Vincent Storme's release from pretrial detention under 18 U.S.C. § 3148 (1984) based on probable cause that Mr. Storme committed crimes while on release and his "unpredictable and erratic" behavior posed a danger to the safety of others. The

court also recognized that Mr. Storme should have been provided with procedural protections before the revocation of his pretrial release, including the opportunity to prepare for a hearing on the matter prior to the court's decision. This case has previously been summarized and published in *The Journal's* September 2024 issue. The prior summary focused on Mr. Storme's conditions for revocation. As this case is also instructive for procedural protections, that aspect is discussed in more detail here.

### Facts of the Case

Mr. Storme was awaiting trial on multiple charges of cyberstalking and unauthorized intrusion into a cell phone in the U.S. District Court for the Northern District of Illinois. The criminal complaints alleged an "extreme online campaign" harassing three women with occasional terrestrial stalking. He was arrested in September 2020 and released on bond into the custody of his mother. Conditions of his bond included curfew, psychiatric treatment, and restricted technology use.

Following his pretrial release, Mr. Storme began to exhibit erratic behavior, including a suicide attempt. Between September 2020 and February 2021, Pretrial Services reported that Mr. Storme violated his curfew over 30 times and had been arrested for allegedly stalking a fourth ex-girlfriend. It was also reported that he was abusing alcohol and continued to express suicidal ideation. Mr. Storme's pretrial release was not revoked at the time, but he was required to participate in substance abuse testing and was prohibited from contacting his ex-girlfriend. A few months later, Mr. Storme's mother relocated from the Chicago area to Virginia without her son, and a new third-party custodian was not appointed by the court.

In July 2023, Mr. Storme moved to dismiss the superseding indictment. Pretrial Services related that Mr. Storme's therapist expressed concern that he may kill himself if he believed the court would deny his motion. Mr. Storme had started to show up in court to watch unrelated proceedings overseen by the judge handling his case, attempting to predict rulings on criminal dismissals. He also began transferring his assets to his mother while hinting at plans for suicide to his Pretrial Services officer and his therapist.

On August 3, 2023, the court reserved ruling on Mr. Storme's motion to dismiss and, without advance notice, revoked his pretrial release. After being removed from the courtroom, Mr. Storme responded

by banging his head against the floor and urging marshals to kill him. An hour later, he attempted to hang himself in a holding cell. The suicide attempt was interrupted by a correctional officer, and he was placed on suicide watch.

Mr. Storme appealed the decision, and the U.S. Court of Appeals, Seventh Circuit, gave the district court until August 8 to direct that Mr. Storme be released within 24 hours unless the government filed a motion to remove Mr. Storme's pretrial release. The government filed a motion to revoke his release, and on August 9, the district court granted the revocation of Mr. Storme's pretrial release, citing he had committed crimes and violated the conditions of his release. The court opined that suicide was a form of flight risk under the Bail Reform Act and that his "erratic behavior" made Mr. Storme "a potential danger to others that could not be adequately mitigated by additional release conditions" (*Storme*, p 1081). Mr. Storme appealed a second time to the Seventh Circuit.

#### Ruling and Reasoning

The Seventh Circuit affirmed the district court's order revoking Mr. Storme's release from pretrial detention. The court indicated that to revoke a person's pretrial release, the Bail Reform Act requires the district court to first find either probable cause to believe that the person has committed a crime while on release or "clear and convincing evidence that the person has violated any other condition of release" (*Storme*, p 1081, citing 18 U.S.C. § 3148(b)(1) (2006)). The court must also find that detention is necessary either to assure that the person will not flee or pose a danger to the safety of others in the community or because the person is unlikely to abide by any conditions of release.

The court was convinced that the conditions for revocation were satisfied. The court noted that the record provided probable cause that Mr. Storme had committed crimes while on release, including felony stalking of an ex-girlfriend, and opined that the remote timing of the event did not pose a barrier to revoking release. The court also considered Mr. Storme's curfew violations and determined that his likelihood of violating release conditions was insufficient to justify detention.

The court then discussed whether detaining Mr. Storme was necessary to prevent him from

fleeing or posing a danger to the safety of others or the community. The court said that suicide risk is distinct from risk of flight or nonappearance and noted that it is relevant to considering the need for detention only if the individual presents a risk of harm to others. It determined that Mr. Storme was responding "unexpectedly, dangerously, and obsessively to adversity in potentially escalatory ways" (*Storme*, p 1084). The court remarked that his repeated stalking behavior under strict supervision and his preparations for escalating behaviors in July 2023 indicated that conditions of release could not prevent an unpredictable action. Citing his lack of support and his presence at unrelated hearings to predict the outcome of his case, the court opined that Mr. Storme's suicide threats constituted threats of unpredictable violence and justified detention.

Regarding the procedural aspects, the court addressed the importance of adherence to procedural protections described in the Bail Reform Act. The court reviewed the procedural history in the case and critiqued the steps taken by the district court on August 3, 2023. The Seventh Circuit commented that the district court could have adhered more closely to several procedural protections contained in the Bail Reform Act. In particular, the district court should have provided advance notice of its consideration of modifying Mr. Storme's release status to provide him with an opportunity to prepare for a hearing. The court also expressed that the Bail Reform Act requires a court to express its findings regarding detention. These measures would have alerted Mr. Storme to potential changes to his release and provided him a full and fair opportunity to respond. Although the court also noted that all involved were acting in the best of faith and working through the difficult circumstances presented by Mr. Storme's mental illness, it stated: "Our overarching point is not one of criticism but of positive reinforcement: sound process often matters most in pressure-packed, consequential decisions" (*Storme*, p 1086).

#### Discussion

The *Storme* decision discusses the problems of risk assessment and mitigation in pretrial release, which is relevant to mental health professionals. Although the prevalence and management of suicide in jail has received more attention in recent years, most pretrial

defendants are not confined in jail, and there is currently no available estimate of the incidence of suicide in this supervised population (Reaves BA. Felony defendants in large urban counties, 2009—Statistical tables. U.S. Department of Justice, 2013). Compared with pretrial defendants in custody, this population may have some protective factors for suicide and violence risk. For example, they may have less serious criminal histories, greater levels of financial resources, and more supports. But they may be at higher risk for receiving less frequent supervision and mental health services while having more access to substances and means to suicide and violence. It is important for the treating psychiatrist to be aware of dynamic risk factors associated with changes in a patient's legal case, the impacts of such changes on suicide risk and violence risk, and the impact of court communications on the treatment relationship.

As illustrated by the complexity of Mr. Storme's suicide risk and violence risk, it is possible that an attorney or a court facing similar concerns may ask for the opinion of a forensic psychiatrist. In *Storme*, the court decided that the risk of suicide is different from risk of flight or nonappearance and that suicide risk alone is not a reason for pretrial detention. But courts and legislatures have reached other conclusions regarding this question, with some deciding that it is logical to treat suicide as a form of flight, others considering past suicide attempts as factors for future nonappearance, and others listing suicidal ideation as a factor to consider for pretrial detention for certain charges.

This case is also instructive on the matter of procedural requirements. Although the Seventh Circuit expressed understanding of the trial court's August 3 decisions in an effort to protect Mr. Storme, it emphasized the importance of adhering to the requirements of the revocation process. The court recognized that these safeguards protect parties' rights and interests and foster a full and fair opportunity for everyone to convey their positions. Forensic psychiatrists are commonly involved in procedural aspects of cases, and they too would benefit from being alert to procedural irregularities and maintaining records. These practices maximize the chances of clean transcripts and clear findings, which are important should case decisions be appealed.

## No Felony Conviction Recovery Rule as It Relates to Psychiatric Malpractice

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### No Felony Conviction Recovery Rule Bars Tort Action for Psychiatric Malpractice Prior to the Commission of Volitional Felonious Acts

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**Key words:** *ex turpi causa*; *in pari delicto*; no felony conviction recovery rule; psychiatric malpractice; volitional conduct

In *DiNardo v. Kohler*, 304 A.3d 1187 (Pa. 2023), the Pennsylvania Supreme Court considered whether potential psychiatric malpractice prior to the commission of volitional felonious acts could justify an appellant pursuing tort action for individual losses suffered. Specifically, the court considered whether the psychiatric providers who treated the appellant prior to his commission of multiple murders could be held liable for indemnification and gross negligence, allowing the appellant to seek recovery for compensatory damages, attorney fees, and money paid to his victims' estates because of civil actions against him. The court held the "no felony conviction recovery" rule, which prohibits an individual from profiting from his own criminal conduct, barred medical malpractice and indemnification claims brought against the appellant's psychiatric providers.

#### Facts of the Case

In December 2016, Cosmo DiNardo, who had been previously diagnosed with bipolar disorder,