DEVELOPMENTS IN MENTAL HEALTH LAW

The Institute of Law, Psychiatry & Public Policy — The University of Virginia

Volume 32, Issue 4 **November 2013**

Highlights in This Issue

Recently Decided and Pending Cases

- US Supreme Court to Review Florida's Bright-Line IQ Test to Determine Mental Retardation in Capital Cases
- Sixth Circuit Upholds Death Penalty on Basis of One IQ Finding of 71
- Fifth Circuit Holds Capital Defendant Not Entitled to All Expert Funding Requested; Was Competent-to-Be-Executed; *Edwards* Decision on State's Right to Deny Self-Representation Not Retroactive
- Texas Appellate Court Finds Trial Court Lacks Authority to Order Incompetent Inmate to Be Involuntarily Medicated to Restore His Competency to Be Executed
- New Jersey Supreme Court Holds Affirmative Defense and Insanity Defense Must Be Raised in Unitary Trial
- Washington Supreme Court Finds Competency Evaluation Open to Public When It Becomes Court Record
- Eleventh Circuit Requires Florida Medicaid Program to Provide ABA Therapy When Medically Necessary As Treatment for Autism Spectrum Disorders

Recently Decided and Pending Cases

United States Supreme Court to Review Florida's Bright-Line IQ Test to Determine Mental Retardation in Capital Cases

The United States Supreme Court has granted a capital prisoner's Petition for Writ of *Certiorari* to determine whether Florida's scheme utilizing a bright-line IQ score of 70 for identifying defendants with mental retardation in capital cases violates *Atkins v. Virginia*. *Hall v. Florida*, No. 12-10882, _S. Ct._, 2013 WL 3153535(mem) (Oct. 21, 2013). In *Atkins v.*

Virginia, 536 U.S. 304 (2002), the Supreme Court held that the execution of defendants with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment. In a *per curiam* opinion, the Florida Supreme Court determined that the defendant could not meet the first prong of the mental retardation standard establishing a maximum IQ score of 70 and upheld his death sentence. *Hall v. Florida*, 109 So. Ed 704 (Fla. 2012). Should the Supreme Court overturn Florida's scheme, the decision could impact mental retardation determinations in the states that still employ the death penalty, especially the twelve states, including Virginia, that have either a statutory or case law bright-line rule that does not apply the standard error measurement.

Freddie Lee Hall was convicted in 1981 for the 1978 murder of a man he kidnapped while robbing a convenience store. Upon fleeing the scene of the robbery, Hall stole a car and kidnapped his victim, and then drove approximately 18 miles to a wooded area where he killed him. Hall appealed his conviction, which was upheld, and filed numerous post-conviction petitions through the years, all of which were eventually denied.

In 1988, Hall again challenged his death sentence, arguing based on a then recently decided United States Supreme Court decision holding that all mitigating factors, and not just statutory mitigation, must be considered by the judge and jury. The Florida Supreme Court granted Hall's petition in 1989 and remanded his case to the trial court for a new sentencing proceeding. During his resentencing hearing, the trial court found Hall to be mentally retarded as a mitigating factor but gave it "unquantifiable" weight, finding aggravating factors that outweighed the mental retardation factor, and again sentenced him to death. The Florida Supreme Court upheld this decision in 1993. Hall again pursued post-conviction relief which the Florida Supreme Court denied, finding that the trial court did not err in finding him competent to proceed at the resentencing, but writing "while there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings." *Hall v. State*, 742 So.2d 225, 229 (Fla. 1999).

In 2002, the United States Supreme Court decided *Atkins*, holding that imposition of the death penalty for defendants with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment. The Supreme Court, however, left it to the States to determine how to measure mental retardation. Following this decision, Hall filed a motion to vacate his sentence, arguing among other things, that the issue of his mental retardation could not be re-litigated because he had already been found mentally retarded at his mitigation resentencing hearing. The trial court denied this motion, and at the 2-day evidentiary hearing in December 2009, testimony was presented concerning Hall's behavior and functioning as a child, including his problems with reading, writing and caring for himself. One expert testified that Hall's IQ using the Wechsler Adult Intelligence Scale Revised was 73, and that a prior result given by another psychologist on the same test was 80. Another expert testified that Hall scored a 71 on the Wechsler Adult Intelligence Scale Third Edition (WAIS-III). Hall also sought to introduce a report completed by a then-deceased expert reflecting a score of 69, which the court refused to admit into evidence. The trial court then refused to vacate Hall's sentence because he could not meet the first prong of the mental retardation standard – an IQ of 70 or below.

Florida statute § 921.137(1), adopted in 2001 prior to the *Atkins* decision, but after Hall's mitigation resentencing hearing, defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." It defines "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." Two standard deviations of 15 points each from the mean of 100 is an IQ score of 70.

On appeal, Hall argued, among other things, that IQ should be read as a range of scores from 67 to 75 and that Florida's adoption of a firm cutoff of 70 or below misapplies *Atkins* and fails to reflect an understanding of IQ testing. He argued that the appropriate standard should also include the standard error measurement (SEM). Relying on its precedent interpreting the statute, the Florida Supreme Court stated that the Florida statute does not use the word "approximate," nor does it reference the standard error measurement. Based on the plain meaning of the statute, the Court held that the legislature established a bright-line IQ standard of 70 from which it could not deviate. It further found that *Atkins* did not mandate a specific IQ score or range of scores. Because Hall could not meet the first standard of an IQ of 70 or below, the Court held that the trial court did not err in refusing to admit evidence establishing deficits in Hall's adaptive behavior that manifested before age 18.

The Court also found the trial court did not err in refusing to admit the report of the deceased psychologist reflecting an IQ of 69 because the underlying data supporting the report were not available and subject to challenge by the State. The Court also rejected Hall's argument that Florida was precluded from challenging his mental retardation because the trial court had previously found him to be mentally retarded during the previous resentencing hearing on mitigation The Court found that the mitigation hearing occurred prior to the enactment of the Florida statute defining mental retardation and the current definition controlled, and that mental retardation as a mitigating factor and mental retardation under *Atkins* were discrete legal issues.

Three justices concurred in the *per curiam* opinion and one justice concurred separately in the result, also finding a strict cutoff IQ of 70 based upon a plain reading of the statute. The concurring justice focused his opinion, however, on the lack of issue preclusion from the mitigation hearing. He stated that even though the trial court at the mitigation hearing found Hall to be mentally retarded, it expressed concerns throughout the hearing that Hall's experts were exaggerating his inabilities. The justice also noted that Hall's crime reflected more deliberation and planning than would be expected from a typical defendant with mental retardation.

The majority of the Florida Supreme Court did not address the constitutionality of Florida's statutory scheme. Two dissenting justices did, however. One justice wrote that the trial court had found that Hall had been mentally retarded his entire life but ironically his execution was being permitted solely by the Legislature's after-enacted and inflexible definition of mental retardation. He noted that *Atkins* did not prescribe any bright-line cutoff, although it stated that "mild" mental retardation is typically used to describe someone with an IQ level in the range of 50 to 70. Because of the difficulty in determining which offenders are in fact mentally retarded, the Supreme Court left it to the States to develop "appropriate" ways to enforce the

constitutional restriction on execution of sentences. This justice would have found therefore that imposition of a bright-line IQ cutoff was not "appropriate" when there was ample evidence of mental retardation from an early age.

The second dissenting justice wrote that imposing the death sentence on a prisoner who had been found mentally retarded even though he could not establish an IQ of below 70 would produce an absurd result. He went on to recite the record evidence reflecting Hall's mental retardation, including testimony of an IQ of 60, his organic brain damage, chronic psychosis, speech impediment and learning disability. The justice wrote that Hall is functionally illiterate and has the short-term memory of a first grader. He indicated that the evidence also suggested that Hall was suffering from a mental and emotional disturbance, and to some extent may have been unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The justice also wrote that the record reflected Hall suffered tremendous physical abuse and torture as a child. He was the sixteenth of seventeen children and was tortured by his mother. She tied him in a "croaker" sack, swinging it over a fire and beat him; buried him in the sand up to his neck to strengthen his legs; tied his hands to a rope attached to a ceiling beam and beat him while naked; locked him in a smokehouse for extended periods; and held a gun on him and his siblings while poking them with sticks. The justice went on to write that the Supreme Court articulated in *Atkins* that those with disabilities in areas of reasoning, judgment and control of their impulses do not act with the same level of moral culpability that characterizes the most serious criminal conduct and in the interest of justice, he would have vacated the sentence.

The Supreme Court should hear this case during its January term and its decision may provide more guidance to the States in implementation of the death penalty for defendants alleging mental retardation. Florida is not unique in its use of a bright-line IQ score of 70, but there is no clear consensus among the States on this issue. Ten states among those that still impose the death penalty, including Virginia under Va. Code § 19.2-264.3:1.1(A), have a statutory bright-line rule and do not apply the standard error measurement. Two additional states, Alabama and Kansas, apply a bright-line rule through court decision. Sixteen states apply the standard error measurement, including ten states without a bright-line cutoff. The application of the standard error measurement to IQ scores in the remaining four states is unclear.

Sixth Circuit Upholds Death Penalty on Basis of One IQ Finding of 71

In deferring to the findings of the state trial court relying primarily on a single IQ score of 71, the Sixth Circuit Court of Appeals denied habeas corpus relief to an inmate convicted of killing his wife and sentenced to death. One dissenting judge on the three-judge panel disagreed writing that the state court's opinion was so far outside the mainstream of scientific opinion that it was not entitled to deference. *O'Neal v. Bagley,* 728 F.3d 552 (6th Cir. 2013).

In September 1993, James O'Neal and his wife moved into a house in Cincinnati, Ohio, with four children from his wife's prior relationships, and his two children from his prior relationships. In December 1993, an altercation broke out between O'Neal and his wife and she threw O'Neal and his children out of the house. As a result, O'Neal "took to the streets" and it

was not clear where the children went. On December 11th, O'Neal returned to the house to "teach his wife a lesson," breaking down the door and following her to an upstairs bedroom, where he fired three shots at her, one of which was fatal. Her son Ricardo testified that O'Neal tried to shoot him but gave up when his gun jammed.

A jury convicted O'Neal of aggravated murder and recommended the death penalty, which was upheld on direct appeal. Following the United States Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), O'Neal sought post-conviction relief, filing eighteen claims for relief, one of which alleged he was mentally retarded. The district court rejected the claims based on either procedural default or on the merits of each claim. Four claims were certified as appealable to the Sixth Circuit.

On August 26, 2013, the Sixth Circuit rejected each of the claims, most notably O'Neal's claim of mental retardation. Under the Antiterrorism and Effective Death Penalty Act, the Court held that O'Neal is entitled to relief only if he can establish that the state appellate court unreasonably determined the facts in light of the evidence presented. O'Neal failed to rebut the presumption raised by an over-70 IQ score by clear and convincing evidence.

In *Atkins*, the United States Supreme Court held that the execution of individuals with mental retardation violates the Eighth Amendment prohibition against cruel and unusual punishment. The Court left it to the states to define mental retardation. The Ohio Supreme Court adopted the definitions of the American Association of Mental Retardation and American Psychiatric Association in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), holding that an individual is mentally retarded if he has: "(1) significantly sub-average intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." Unlike Florida, it added that there is a rebuttable presumption that an individual is not mentally retarded if his IQ is above 70.

In upholding the finding of the trial court, the state appellate court determined that O'Neal was not mentally retarded because he did not suffer from significantly sub-average intellectual function based on an IQ score of over 70 and did not have limitations in two or more adaptive skills. In separately administered IQ tests, O'Neal scored below 70 on three occasions between 1968 and 2004, and only once scored 71 in 1994. O'Neal's expert clinical psychologist testified that he suffered from mild cerebral dysfunction which contributed to his low intellectual function and thus had a significant limitation in academic skills. His expert also testified that O'Neal had little ability to consider alternative modes of dealing with stressful situations or situations he found threatening, demonstrating significant limitations in social skills. Based on these findings, O'Neal's expert diagnosed him as suffering from mild to borderline mental retardation.

The Sixth Circuit determined based on all the evidence that reasonable minds could differ on whether O'Neal was mentally retarded or not, and as a result he did not carry his burden of undermining the state court's factual findings by clear and convincing evidence. The Court reasoned that three sub-70 IQ scores were insufficient alone to prove O'Neal had significant subaverage intellectual functioning. Another clinical psychologist who evaluated O'Neal prior to trial and a third who reviewed the evaluations and other records at the State's request but never

met O'Neal face-to-face, both concluded that O'Neal functions at a higher level than his IQ scores suggest. The third psychologist noted that O'Neal functions in at least the borderline range of practical adaptive skills, but attributed his social limitations to drug abuse and personality disorder rather than specific intellectual/adaptive behavior deficits.

One judge on the three-judge panel dissented writing that reliance on one IQ scored over 70 alone was not supported by scientific literature or the Supreme Court decision in *Atkins*. That Court determined that a single IQ test of 71 could not be a proper basis for finding normality, pointing out that the literature considers that between 1% and 3% of the population has an IQ score between 70 and 75 or lower. The dissent points out that O'Neal's IQ scores were all below 70 except one. O'Neal's expert testified that the 71 score was the result of an old Wechsler test which turned out to be 67 when the test was re-administered. The dissent states that this one-test methodology does not comply with standards established by modern scientific opinion or the Supreme Court in *Atkins*.

The dissent further points out that the state court relied on the opinions of two psychologists who did not testify at the mental retardation hearing, and one of whom never evaluated O'Neal regarding his adaptive skills. The state court relied on the fact that O'Neal worked as a dishwasher, briefly had custody of his children, and served as a marine to demonstrate that his social adaptive functioning was normal. The dissent disagreed stating that many individuals with intellectual disability maintain employment but O'Neal's work history was riddled with absenteeism and tardiness. O'Neal also was AWOL from the marines and dishonorably discharged. O'Neal also admitted to police that he did not know where his children were living when he killed his wife. For these reasons, the dissenting judge determined that the findings of the state appellate court were not entitled to deference.

Fifth Circuit Holds Capital Defendant Not Entitled to All Expert Funding Requested; Was Competent-to-Be-Executed; *Edwards* Decision on State's Right to Deny Self-Representation Not Retroactive

The Fifth Circuit Court of Appeals upheld the death penalty on August 21, 2013 for a mentally ill inmate alleging incompetence-to-be-executed, finding the district court's decision to deny funding for additional expert assistance and testing was not an abuse of discretion. The Fifth Circuit also held that the district court's decision weighed all of the evidence, including the inmate's secretly recorded conversations with family, and was therefore not clearly erroneous. The Court further held that the United States Supreme Court case of *Indiana v. Edwards*, 554 U.S. 164 (2008), holding that the State may prohibit a mentally ill inmate found competent to stand trial from representing himself at trial had no retroactive application in federal habeas corpus proceedings. *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013.)

In 1992, Scott Louis Panetti shot his estranged wife's parents at close range, killing them and spraying his wife and three-year-old daughter with their blood. Panetti demanded to represent himself at trial although he had a long history of schizophrenia, and in spite of the trial judge's pleas to accept counsel. His only defense was insanity. His appointed standby counsel described his self-representation as bizarre and his trial a farce and mockery of self-

representation. The jury convicted him of capital murder and sentenced him to death. The conviction and sentence were upheld on direct appeal and collateral review.

In October 2003, the trial court set an execution date and Panetti filed a motion alleging for the first time that he was incompetent-to-be-executed. The trial court rejected the motion without a hearing. Texas law required Panetti to make a "substantial showing of incompetency" before entitling him to court-appointed experts. On federal habeas review, Panetti submitted additional evidence of mental illness and the district court stayed the execution to permit the state trial court to consider the renewed motion in light of the supplemental evidence. In February 2004, the state court appointed a psychiatrist and a clinical psychologist to examine Panetti, implicitly finding he had made a substantial showing of incompetency. These experts filed a joint report finding Panetti competent-to-be-executed. Without holding a hearing or ruling on Panetti's motion to appoint him his own experts, the trial court found Panetti competent-to-be-executed.

Panetti then returned to federal court arguing that Texas' failure to appoint him mental health experts and provide a hearing violated his due process rights under *Ford v. Wainright*, 477 U.S. 399 (1986). *Ford* held that denying a prisoner the right to present and rebut evidence in a competency-to-be-executed proceeding violated due process. The district court agreed and also found that such a denial by the state court was not entitled to deference under the Antiterrorism and Effective Death Penalty Act. Panetti's experts then testified that he understood the reason for his execution – the murder of his in-laws, but his delusions caused him to believe Texas was in league with the forces of evil and sought to prevent him from preaching the Gospel. The State's experts agreed Panetti was mentally ill, but his behavior was attributed to malingering. After hearing the evidence, the district court found that Panetti's delusional belief system prevented him from rationally appreciating the connection between his crimes and his execution. But the district court found Panetti competent to be executed because the Fifth Circuit standard at that time was that the prisoner only needed to know the fact of his impending execution and the reason for it. The Fifth Circuit affirmed the district court decision and Panetti petitioned the United States Supreme Court for review.

In 2007, the United States Supreme Court granted Panetti's petition for *certiorari* and reversed, finding the Fifth Circuit's standard for competency-to-be-executed too restrictive. Declining, to set out a standard, the Supreme Court remanded the case requiring the district court to determine in a more definitive manner the nature and severity of Panetti's mental health problems and whether his delusions impaired his concept of reality to the extent that he did not have a rational understanding of the reason for the execution. *Panetti v. Quarterman*, 551 U.S. 930 (2007).

On remand, the defense hired three experts, a clinical neurologist, a forensic psychiatrist and a forensic psychologist who had examined Panetti for the original hearing in 2004. These experts evaluated Panetti for a combined total of over 15 hours and administered a battery of tests designed to detect the likelihood of malingering. The district court authorized $9000 to pay the experts, but rejected his requests for additional funding. These experts all diagnosed Panetti with schizophrenia, although the psychologist who had examined him previously found Panetti had markedly improved since his 2004 examination. The other two experts testified that Panetti

suffered from a genuine delusion that he was on death row to preach the Gospel and save souls. The defense also called two death row inmates who testified that Panetti preached incessantly in his cell and in the day room even though it irritated other inmates.

Texas presented testimony from a forensic psychologist and an expert psychiatrist and neurologist. Both testified that Panetti was partially fabricating his symptoms to thwart attempts to administer tests to detect malingering. The psychiatrist also doubted whether he was suffering from any form of mental illness, and was emphatic that Panetti had a rational understanding between his crime and execution because of his repeated assertions that he was unjustly convicted despite his insanity and that God had forgiven his guilt. Texas also called three correctional guards as witnesses who testified Panetti was never a problem; was generally well-behaved, but would often have some religious statement to make; that the preaching was well thought out and the same as you would hear at church; and that some guards would assign Panetti to a cell to get revenge on an inmate because they knew his constant preaching would irritate him.

Texas also presented secret recordings of his conversations with his family. The tapes indicated that while Panetti did quote scripture and make religious comments, he did not rant or preach, and the conversations involved extended discussion about the trial judge's corruptness and ineptitude. The district court's summary of the tapes reflects that Panetti at no time became irrational, tangential or pressured in his speech. His comments about his legal proceedings reflected a fairly sophisticated understanding of his circumstances.

After hearing all of this evidence, the district court found that Panetti was seriously mentally ill and suffered from paranoid delusions of some type. The court also determined that Panetti was exaggerating some of his symptoms to avoid execution, stating that Panetti demonstrated a fairly sophisticated understanding of his case and that his refusal to cooperate with State experts contrasted with his treatment of his own experts. The district court then determined that Panetti had both a factual and rational understanding of his crime, his impending death and the causal retributive connection between the two.

On appeal, the Fifth Circuit first determined that the district court did not abuse its discretion in refusing to provide additional funding to permit his experts to review the secret recordings and to obtain a PET scan to detect malingering. The Fifth Circuit found that the district court authorized $9000 to fund an expert team to assist Panetti in presenting his competency evidence and they were able to review a large number of the secret recordings. The request for a PET scan also violated the court's scheduling order. Although the Supreme Court's decisions in *Ford* and *Panetti* established a constitutional right to expert assistance in Eighth Amendment competency-to-be-executed hearings, the Court held the cases merely entitle the inmate to an opportunity to present his own expert testimony before a neutral decision maker. The decisions do not require the court to provide all of the expert assistance the inmate requests.

The Fifth Circuit also agreed that the Supreme Court's remand required a "rational understanding" test for Eighth Amendment competency-to-be-executed proceedings, but disagreed with the district court determination, finding that the test is not the same as the *Dusky* standard applied in competency to stand trial situations. The Eighth Amendment standard arises

out of the retributive value of executing a person who has no comprehension of why he is being executed and the abhorrence of civilized societies to kill someone who has no capacity to come to grips with his own conscience or deity. Nonetheless, the Fifth Circuit agreed that the district court applied the correct rational understanding analysis in finding Panetti had both a factual and rational understanding of his crime, his impending death and the causal retributive connection between the two, based especially upon Panetti's rationally articulated position that his punishment was unjustified because of his insanity at the time of his offense. The Fifth Circuit then found that the expert testimony was conflicting and that the district court's finding of competency was therefore not clearly erroneous. The Court also found that the secret recordings generally corroborated the testimony of the State's experts and that Panetti actually understood the reason for his punishment.

Finally, Panetti raised for the first time before the Fifth Circuit the issue that the State should not have permitted him to represent himself at trial. At the time of his trial, Panetti had been found competent to stand trial and then insisted on exercising his right of self-representation. The United States Supreme Court cases of *Faretta v. California*, 422 U.S. 806 (1975), holding that defendants have a Sixth Amendment right to represent themselves, and *Godinez v. Moran*, 509 U.S. 389 (1993), suggesting that this right was absolute even if invoked by a severely mentally ill defendant, had been decided at the time of Panetti's trial. The Supreme Court later held in *Indiana v. Edwards*, 554 U.S. 164 (2008), after Panetti's trial, that the right of self-representation was not absolute and the State could insist that an attorney be appointed to represent a mentally ill defendant even though he had been found competent to stand trial.

The Fifth Circuit found, however, that this decision had no retroactive application to habeas petitions. In order to apply a new rule of constitutional law retroactively to federal habeas proceedings, the new rule must be a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings. The Court found that the right of the State to impose representation on a mentally ill defendant did not effect a sea change in criminal procedure. The *Edwards* decision also only applies in the exceptional situation where the defendant is competent to stand trial but so severely mentally ill that his self-representation threatens an improper conviction or sentence. Furthermore, *Edwards* is only permissive, allowing the state to insist on counsel but not requiring that it do so. The Court held that its application was therefore not retroactive.

Texas Appellate Court Finds Trial Court Lacks Authority to Order Incompetent Inmate to Be Involuntarily Medicated to Restore His Competency to Be Executed

The Texas Court of Criminal Appeals held on September 13, 2013 that a trial court had no authority to order a mentally ill inmate, who had previously been found incompetent to be executed to be medicated under the State's competency-to-be-executed statute and therefore vacated the execution order. *Staley v. Texas*, _ S.W.3d _, 2013 WL 4820128 (Tex.Crim.App. 2013).

In 1991, Steven Kenneth Staley was convicted of capital murder when he and two others rounded up a group of employees at a restaurant, threatened them with firearms, and killed the manager after taking him hostage. The trial court has since held two competency hearings finding Staley incompetent to be executed at the first hearing, and competent at the second.

A month before his scheduled execution in 2006, Staley filed a motion challenging his competence to be executed, arguing that his competence was "artificial" due to his involuntary medication. The trial court appointed two clinical forensic psychologists as experts to evaluate him. They both found that Staley suffered from paranoid schizophrenia for which he had routinely been diagnosed for 15 years, and that his condition had deteriorated over time. They reported that although he understood he was to be executed, Staley did not have a rational understanding of the reason for his execution. They further testified that Staley had been prescribed medications, mainly Haldol, through the years but that he had not consistently complied with his mediation regimen. In the months immediately preceding the competency evaluations, he had frequently refused the mediation.

One of the evaluators testified that Staley demonstrated numerous symptoms of psychosis over the years, including self-inflicted injuries, grossly neglected personal hygiene, including resting in his own urine and excrement, irregular eating and sleeping habits, and delusions of paralysis to the extent of lying in bed so long as to rub a bald spot on his head. The psychologist further described Staley's history of spontaneously and repeatedly refusing medication, and testified that he would probably require compulsory medication for long-term control of his symptoms. He stated that good medical practice would involve medication to control his symptoms.

The other clinical psychologist also testified that Staley's symptoms included "syntactical aphasia," which is the nonsensical ordering of words as well as the regular use of fictitious language. He further testified that when Staley was medication compliant he showed no symptoms of decompensation, but he frequently refused medication because he denied his illness, believing it was an attempt to poison him. Based on all of the testimony, the trial court found Staley incompetent to be executed.

The following month, the State moved the trial court to order involuntary medication, arguing both the medical purpose of the medication and the State's interest in enforcing the judgment. Staley opposed the motion arguing that the side effects of the medication were harmful, and that the medication only produced "artificial competence" and did not therefore meet the competency-to-be-executed standard under the federal or Texas constitutions or the Texas statute.

The trial court authorized the involuntary medication finding that (1) the State has a legitimate interest in enforcing the sentence that is not outweighed by the inmate's interest in avoiding medication; (2) the medication is the least intrusive and only method of achieving competency; (3) compelling medication is in the inmate's best medical interest because without it he will suffer "frightening delusions and general disorder within his mind" and there is no evidence he had suffered side effects from the medication; and (4) without medication he posed a danger to himself and others. Staley immediately appealed this decision to the Court of Criminal

Appeals, but the Court found the involuntary medication order to be a non-appealable interlocutory order.

In 2012, the State filed a request with the trial court for a further competency examination. The court heard evidence from one of the clinical psychologists who had testified at the first hearing and another clinical psychologist, both of whom found Staley was now competent to be executed. They testified that although Staley was experiencing delusional thoughts, his symptoms were under control with about 60% compliance with Haldol and that he knew many of the details of the litigation and crime. He knew the names of the defense attorneys, prosecutors, and the victim, and that the death penalty was, in his words, to "retribute the public for a heinous crime." He also understood the lethal injection process and described the death process as permanently going to sleep. Staley did not actually believe, however, that he would be executed because he thought his attorneys would obtain a stay. One expert testified that Staley met the competence-to-be-executed standard under the statute because he understood (1) that he was to be executed and his execution was imminent and (2) the reason for his execution. After hearing the evidence, the trial court found Staley competent to be executed, but only because of the effects of forced medication. Staley then appealed this decision to the Texas Court of Criminal Appeals arguing, among other things, that the trial court lacked authority to order his involuntary medication to restore him to competency to be executed.

On appeal, the Texas Appellate Court observed that a trial court derives its jurisdiction only from state law or the Texas Constitution, and once a conviction has been affirmed on appeal, general jurisdiction is not restored in the trial court. A trial court obtains jurisdiction post-conviction under a number of different Texas statutes, for example, to set an execution date, conduct DNA testing, or determine whether an inmate is competent to be executed. If an execution is stayed based on a determination that the inmate is incompetent, the trial court is required to order the inmate's periodic re-evaluation by mental health experts to determine whether he is no longer incompetent to be executed. The Court held, however, that the statute does not convey the authority on the trial court to order involuntary medication to restore the inmate to competency to be executed. The Court rejected the State's argument that the trial court had inherent or implied authority to order involuntary medication or that such a lack of authority would produce an absurd result in cases such as this.

By contrast, Texas statutes permit the involuntary medication of people who are involuntarily committed, or are incompetent and awaiting trial. The Court noted that in Texas this process involves an administrative hearing, not a judicial hearing, before a non-treating psychiatrist. Trial courts may also order a defendant to be forcibly medicated when under court order to receive inpatient mental health services or to be restored to competency to stand trial, but not to be executed.

Because the evidence demonstrated that Staley would have been incompetent to be executed but for the trial court's involuntary medication order, the Court held that he did not meet the competency-to-be-executed definition under the Texas statute or the Texas or federal constitutions. The trial court's unauthorized order was the sole cause of the transformation of evidence from supporting a finding of incompetence to one of competence. The Court therefore

vacated the finding of competence and remanded the case to the trial court for periodic re-examinations of Staley's competence to be executed.

New Jersey Supreme Court Holds Affirmative Defense and Insanity Defense Must Be Raised in Unitary Trial

Overruling a prior and long-standing Appellate Court decision, the New Jersey Supreme Court held on September 9, 2013 that an insanity defense and the affirmative defense of self-defense must be raised in the same unitary trial, and not in a bifurcated trial. *State v. Handy*, 215 N.J.Super. 334, 73 A.3d 421 (2013). The defendant who had a long history of mental illness was charged with the murder of his uncle. With the concurrence of his attorney, the insanity defense was imposed upon the defendant and the trial court required a bifurcated trial in which the issue of the defendant's sanity would be tried first. If he did not prevail on the insanity defense, the defendant could then raise the defense of self-defense. The New Jersey Supreme Court reversed holding that the defendant was denied his Fifth Amendment Right to be free from double jeopardy and remanded the case for the defendant to pursue his self-defense claim. If unsuccessful, his insanity finding would stand. In all future cases, the Court held the two defenses must be tried in a unitary, not bifurcated proceeding.

In January 2004, Robert Handy was charged with the murder of his uncle. The uncle died from a single stab wound to the chest. Handy claimed his uncle hit him with a pipe. Police found a pipe with the words "King Reveal" marked on it near the crime scene and the same words tattooed on the uncle's body. The uncle also had a long history of drug-related criminal activity, including an arrest one week prior to his death. Handy had a history of psychiatric problems with several in-patient hospitalizations. Five months prior to the stabbing, Handy was exhibiting bizarre behaviors and was admitted to a psychiatric hospital, suffering from paranoid schizophrenia. Upon his release approximately six weeks later, he promised to take his medications, but did not believe there was anything wrong with him. He then ceased taking his medications. He suffered from delusions about having been sexually and physically assaulted by hundreds of individuals while hospitalized, including his attorney and the judge who had presided over his case. He maintained a list of over forty individuals whom he claimed had assaulted him, with his uncle's name at the top.

Following his arrest, Handy was transferred to the Ann Klein Forensic Services where he was forcibly medicated, and his mental status improved. A clinical psychologist at the forensic center reported that Handy was competent to stand trial even though he continued to suffer from paranoid delusions, including delusions that his attorney and a judge were still among those who had abused him at the hospital. She reported that Handy was likely to remain competent as long as he took his medications. The defense hired a psychologist who disagreed stating that Handy was not competent to stand trial and would not be until he was free from his persistent delusions. It was also his opinion that Handy's prognosis was "poor" that he would ever be free of his delusions.

During the competency proceedings, the State argued that Handy was competent to stand trial and his attorney did not contest his competency, despite his expert's opinion. Both attorneys also agreed that the two defenses of insanity and self-defense could not be tried together in the

same, unified proceeding believing that a prior New Jersey Appellate Court decision, *State v. Khan*, 175 N.J. Super. 72 (App. Div. 1980), required a bifurcated trial. That case held that trying the defendant on two defenses together would lead to jury confusion and prejudice to the defendant. The State argued that insanity should be tried first to insure that the trier of fact would not be confused between the insanity defense and the self-defense claim. Handy argued, however, that he should be permitted to raise the self-defense claim first, arguing that if he prevailed on the substantive claim, the case would be over. The trial court ruled that the insanity defense should be tried first because it related to a substantive element of the offense rather than to an affirmative defense the defendant sought to interpose. Handy then waived his right to a jury trial on the insanity issue. The judge found him not guilty by reason of insanity ("NGRI") and committed him for treatment. No further proceedings were conducted on the self-defense claim.

Handy appealed the NGRI finding to the Appellate Division. That court continued to hold that such cases should be tried in bifurcated proceedings, but found that the substantive defense should be tried first, followed by the insanity defense. It then remanded the case to the trial court, whereupon Handy would be presented with the option of waiving his right against double jeopardy. The NGRI finding would then be vacated and he would be tried first on the self-defense claim. If he was unsuccessful, he then would be tried on the issue of his sanity at the time of the offense.

Handy appealed this decision to the New Jersey Supreme Court. The Supreme Court agreed with Handy that requiring him to surrender his NGRI finding would violate the constitutional prohibition against double jeopardy. The Court held that the bifurcated approach in *Khan* was no longer viable and should no longer be utilized by the courts. It held that in the future trials that involve both a substantive defense and an insanity defense, both defenses must be tried in a unitary proceeding. The Court reasoned that neither the state nor the federal constitution gives defendants the right to have a trial proceed in two stages. Trials are ordinarily tried in one proceeding in which all claims are adjudicated together. As a practical matter, the trier of fact needs all of the evidence to make a reasoned decision. In a case such as this in which the defendant relies on self-defense, most of the evidence about the defendant's delusions would be admissible to rebut the reasonableness of the defendant's belief concerning the use of deadly force. Because the State must also present evidence of mental status to prove intent, offering only part of that evidence would provide the jury with a less-than-complete and inaccurate record.

The Court went on to find in this case that requiring the defendant to relinquish the insanity finding would violate the defendant's Fifth Amendment protection against twice being put in jeopardy for the same offense. The Court therefore held that in this case alone, the defendant, if found competent to stand trial, should be provided the opportunity to be acquitted of the crime on his self-defense theory. If acquitted, he would be free of the charge. If convicted, the insanity verdict would still stand and he would be committed for treatment.

The Court also noted the confusion between whether a defendant can be competent to stand trial and competent to waive the insanity defense. It held that the same procedure should be utilized to determine whether a defendant is competent to waive the insanity defense as is applied in evaluating whether a defendant can waive other significant rights. It said the court

should conduct a thorough and searching inquiry of an otherwise competent defendant's understanding of the nature of the right being waived and the implications flowing from that choice to determine whether the waiver is knowing, voluntary and intelligent.

Washington Supreme Court Finds Competency Evaluation Open to Public When It Becomes Court Record

Under Washington law, competency evaluations are confidential and available only to certain specified individuals with a need to access the information. The Washington Supreme Court held on September 5, 2013 that the State constitutional requirement that all cases be administered openly supersedes that law. A court may seal a competency evaluation only when it makes an individualized finding that factors enumerated in a Washington Supreme Court case, *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) weigh in favor of sealing. *State v. Chen*, 309 P.3d 410 (Wash. 2013).

Defendant Louis Chen was charged with two counts of aggravated murder that occurred in August 2011. Chen's attorney presented mitigation information to discourage the State from seeking the death penalty. Part of this information was an opinion from a psychiatrist that Chen was not competent to stand trial. As a result, the trial court ordered that Chen be evaluated by doctors at Washington's Western State Hospital. After receipt of the evaluation, the court found Chen competent to stand trial. Chen moved to seal the competency evaluation, or in the alternative, to redact certain information. Under Washington law,

> …all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional person who, upon proper showing demonstrates a need for access to such records.

RCW 10.77.210(1).

The trial court denied Chen's motion to seal the evaluation, applying the *Ishikawa* factors, but did redact certain information contained in the report. Under *Ishikawa*, anyone seeking closure of court proceedings must make some showing of a compelling interest, and where the interest is based on a right other than the accused's right to a fair trial, that showing must demonstrate a "serious and imminent threat" to that right. Anyone present must be given an opportunity to object to the closure. The method of closure must be the least restrictive means available for protecting the threatened interest. A television station was in the courtroom and objected to the motion to seal. Direct discretionary review of this decision was granted and during the pendency of the appeal, the trial court stayed its order and sealed the entire evaluation pending review.

On appeal, Chen first argued that if competency evaluations are subject to openness, the statute would be rendered meaningless. The Court held, however, that the statute applies until the competency evaluation becomes a court record, at which point it becomes open to the public.

Chen also argued that important privacy issues are at stake and that public access could taint the jury pool. The Court found that these are important considerations, but they can be adequately addressed as part of a motion to seal. The Court found that competency determinations are an important turning point in the criminal process and the idea of a public check on the judicial process is especially important when competency is at issue. Having found that the statute conflicted with the State constitutional requirement of openness, and that Chen was seeking a blanket exclusion for all competency evaluations, the Court held that the trial court had not abused its discretion in refusing to seal the evaluation and to redact only certain portions of the report.

Eleventh Circuit Holds Florida Medicaid Program Required to Provide ABA Therapy When Medically Necessary As Treatment for Autism Spectrum Disorders

The Eleventh Circuit Court of Appeals upheld on September 30, 2013 the district court's determination that Applied Behavioral Analysis ("ABA") is not an experimental treatment and therefore must be provided to children screened under Florida Medicaid's Early Periodic Screening, Diagnostic and Treatment Services ("EPSDT") when the child's physician determines the services are medically necessary. *Garrido v. Interim Secretary, Florida Agency for Health Care Administration*, 731 F.3d 1152 (11th Cir. 2013).

Plaintiff K.G., through his next friend, Iliana Garrido, filed a complaint in federal district court in February 2011 against the Secretary of Florida's Agency for Health Care Administration ("AHCA") and Florida's Medicaid administrator alleging that Florida's denial of ABA therapy violates the Medicaid Act's EPSDT provisions. Several months thereafter, I.D. and C.C. by their next friends were joined as plaintiffs. All three were Medicaid recipients under age 21 who had been diagnosed with autism or autism spectrum disorders during EPSDT screenings and had been prescribed ABA treatment by their physicians.

Medicaid is a jointly funded federal-state program that assists states in providing medical services to their needy citizens. Subject to the provisions of the Medicaid Act, states design their program. A state's participation is voluntary, with all states now participating. But once a state decides to participate, it must comply with all federal statutory and regulatory requirements. One service states must provide is EPSDT for Medicaid-eligible minors under the age of 21. The EPSDT catch-all provision requires states to provide Medicaid-eligible minors "[s]uch other necessary health care, diagnostic services, treatment, and other measures…to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396(r)(5). Such services, including preventive and rehabilitative services, must be provided if the service is medically necessary to "correct or ameliorate" a condition or defect discovered during an EPSDT screening.

Medicaid permits states to place appropriate limits on services based upon medical necessity. Under Florida's regulatory scheme medically necessary services excludes treatment that is experimental or investigational. Florida defines a treatment as "experimental" when "reliable evidence shows that the consensus among experts regarding the drug, device, or

medical treatment or procedure is that further studies or clinical trials are necessary to determine its maximum tolerated dose, toxicity, safety, or efficacy as compared with the standard means of treatment or diagnosis." Fla. Admin. Code r.59G-1.010(84)(a)3. Florida's Medicaid Handbook enumerates the specific behavioral health services covered by Florida Medicaid, and specifically excludes community behavioral health services for treatment of autism or pervasive developmental delay.

At a four-day bench trial, AHCA employees testified that the Agency did not follow the standard process for determining whether ABA therapy was experimental. By contrast, the plaintiffs presented testimony from numerous experts that ABA is the standard means for treating autism spectrum disorders. Experts also testified that ABA treatment was medically necessary for the individual plaintiffs. The district court thus found that ABA is a preventive or rehabilitative service that is medically necessary and not experimental. It therefore found that Florida is required to provide the service to Medicaid eligible minors under age 21 if necessary to correct or ameliorate a condition discovered in an EPSDT screen. The district court then entered a permanent injunction and declaratory judgment in favor of the plaintiffs and ordered Florida to provide ABA services.

On appeal, the Eleventh Circuit upheld the decision of the district court as not an abuse of discretion, but remanded the case to the district court to clarify its order that the declaratory judgment order and permanent injunction did not eliminate the requirement that Florida make individual medical necessity determinations, consistent with that court's own findings and written decision.

Developments in Mental Health Law is published electronically by the Institute of Law, Psychiatry and Public Policy (ILPPP) with funding from the Virginia Department of Behavioral Health and Developmental Services. The opinions expressed in this publication do not necessarily represent the official position of either the ILPPP or the Department.

Developments in Mental Health Law is available as a *pdf* document via the Institute of Law, Psychiatry and Public Policy's website, within the "Publications/Policy&Practice" section (www.ilppp.virginia.edu). Please find the archive of electronic issues there. If you would like to be notified via email when a new issue of *Developments* is posted to the website you may go to http://ilppp.virginia.edu/MailingList or click here. Please share these links with others who may wish to join the list to receive *Developments in Mental Health Law*. There is no charge.

Letters and inquiries, as well as articles and other materials submitted for review by the editors, should be mailed to DMHL, ILPPP, P.O. Box 800660, University of Virginia Health System, Charlottesville, VA 22908, or to els2e@virginia.edu., or to jhickey080@gmail.com

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ISSN 1063-9977

Institute Programs

Please visit the Institute's website for announcements of programs:

http://ilppp.virginia.edu/OREM/TrainingAndSymposia

Please re-visit the website for updates.

Evaluating Individuals Found Not Guilty by Reason of Insanity

December 11, 2013: This one-day program addresses assessment of persons who have been found Not Guilty by Reason of Insanity (NGRI) in criminal cases and therefore require forensic evaluation regarding commitment or conditional release. Please note that this program is most relevant for VA DBHDS staff involved in evaluation and supervision of NGRI acquittees. This program meets the training requirements for clinicians who conduct VA DBHDS Commissioner-appointed evaluations of NGRI acquittees. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $50. Others: $135. Group discounts to other agencies may be available: please contact els2e@virginia.edu.

Seminar: DSM-5: Defining What is Disordered

December 12, 2013, 1:00-5:00 p.m., Charlottesville, VA: This half-day seminar will provide a brief history of Diagnostic and Statistical Manual of Mental Disorders (DSM), review the development of the new DSM-5, and provide an overview of the major changes to diagnostic criteria in this newest edition of the DSM. Discussion will include some of the controversies surrounding DSM-5 and forensic issues. There is no registration fee but registration is required because space is limited. Please send questions to els2e@virginia.edu.

Risk, Needs, and Responsivity - January 24 2014, Charlottesville

January 24, 2014, Charlottesville, VA: Robert Morgan, Ph.D., an Endowed Professor of Psychology at Texas Tech University, will present a full-day ***Advanced Forensic Seminar on Risk, Needs, and Responsivity Principles with Offenders***. The "RNR" principles underlie modern best-practices approaches to violence risk assessment and treatment, for criminal offenders, including mentally disordered offenders. This seminar is particularly suited for clinicians who work in correctional settings (whether with general population inmates, mentally-disordered offenders, or sexual offenders) and clinicians who work in forensic psychiatric settings (with NGRI acquittees and other forensic patients).

Please visit the Institute website for details as they become available:
http://ilppp.virginia.edu/OREM/TrainingAndSymposia

Assessing Risk for Violence with Juveniles

January 31, 2014, Charlottesville, VA: This one-day program trains juvenile practitioners to apply current research pertaining to risk assessment with juveniles. The agenda includes base rate information on juvenile violence and threatening behavior, structured risk assessment instruments, clinical evaluation of violence risk among adolescents, and ethics in professional practice. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $50. Others: $135. Group discounts to other agencies may be available: please contact els2e@virginia.edu.

Pathways to Desistance to Crime in Juveniles, How Juveniles Understand and Use their Miranda Rights, and Wrongful Conviction of Juvenile Offenders - February 27 2014, Charlottesville

February 27, 2014, Charlottesville, VA: A full-day conference on juvenile forensic issues will include Edward Mulvey, Ph.D., Director, Law and Psychiatry Program, University of Pittsburgh School of Medicine presenting ***Pathways to Desistance to Crime in Juveniles***; Heather Zelle, J.D., Ph.D., Research Fellow, ILPPP, University of Virginia presenting ***How Juveniles Understand and Use their Miranda Rights***; and Gregg McCrary, S.S.A FBI-Retired presenting ***Wrongful Conviction of Juvenile Offenders.***

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Assessing Individuals Charged with Sexual Crimes

February 27-28, 2014, Charlottesville, VA: This program focuses on the assessment and evaluation of sexual offenders, including 19.2-300 pre-sentencing evaluations and 37.2-904 assessment of Sexually Violent Predators (SVPs). The program addresses the legal background relevant to sex-offender evaluation as well as the clinical background including topics such as paraphilias and base rates of reoffending. The program provides training in well-researched sex-offender risk assessment instruments. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $100. Others: $190. Group discounts to other agencies may be available.

Initial Identification of Serious Mental Disorders in Children and Adolescents - April 11 2014, Charlottesville

April 11, 2013, Charlottesville, VA: A full-day training on ***Initial Identification of Serious Mental Disorders in Children and Adolescents***. Please visit the Institute website for details as they become available.

Please visit the Institute website for details as they become available:
http://ilppp.virginia.edu/OREM/TrainingAndSymposia

Conducting Mental Health Evaluations for Capital Proceedings

April 21-22, 2014, Charlottesville, VA: This two-day program prepares experienced forensic mental health professionals to meet the demands of a capital sentencing case, in which the accused faces the possibility of the death penalty. The agenda includes statutory guidelines for conducting these evaluations, the nature of the mitigation inquiry, the increased relevance of mental retardation, the process of consulting with both the defense and the prosecution, and ethics in forensic practice. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $100. Others: $190. Group discounts to other agencies may be available: please contact els2e@virginia.edu.

Juvenile Forensic Evaluation: Principles and Practice

May 5-9, 2014, Charlottesville, VA: This five-day program provides basic legal, clinical, and evidence-based training in the principles and practices of forensic evaluation appropriate for juvenile forensic evaluators. The format combines lectures, clinical case material, and practice case examples for evaluation of juveniles. Ethics of professional practice is explored. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $250. Others: $750.

Evaluation Update: Applying Forensic Skills to Juveniles

May 5,6,7, 2014, Charlottesville, VA: This three-day program is for experienced adult forensic evaluators - who have already completed the five-day "Basic Forensic Evaluation" program (regarding evaluation of adults) and accomplished all relevant qualifications for performing adult forensic evaluation - and wish to become qualified to perform juvenile forensic evaluations. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $100. Others: $190.

Advanced Case Presentation: Juvenile Adjudicative Competence

Date TBD, Charlottesville, VA: Advanced Case Presentation is a follow-up training for all evaluators who have successfully completed the Juvenile Forensic Evaluation training or Evaluation Update training and who wish to complete the training requirements approved by the VA DBHDS Commissioner for individuals authorized to conduct juvenile competence evaluations. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: $50. Others: $135. Group discounts to other agencies may be available: please contact els2e@virginia.edu.

To be announced:

Other programs are being planned:

A two-day training on Competency Restoration is planned for each of several sets of dates in April and May 2014 at several locations in Virginia (venues in Richmond, Newport News, and Roanoke are planned).

A day-long Mock Trial workshop in Charlottesville VA is planned for May 2014.

Please visit the Institute website for details as they become available:
http://ilppp.virginia.edu/OREM/TrainingAndSymposia