

# DEVELOPMENTS IN MENTAL HEALTH LAW

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## I. Feature Article

**Law Enforcement Intervention in Mental Health Crises: The Legal Standards for Officer Conduct after the Supreme Court's Decision in *Sheehan v. City and County of San Francisco***

John E. Oliver

Law enforcement is difficult work. Many officers are periodically called into highly volatile situations, full of uncertainty, that may require them to make split-second decisions on whether and how to use lethal force to protect themselves and the public from harm at the hand of dangerous individuals. That reality makes the public and the courts understandably and appropriately reluctant to second-guess the judgment of officers in such situations. If officers could be disciplined or punished for every action they took, they would not act and public safety would suffer.

Law enforcement is also professional work. In no small part because of the damage that officers can effect when applying force, they receive—or are expected to receive—training on how to respond to volatile situations, how to secure a scene, how to de-escalate conflicted situations, and how to use force judiciously and in proportion to the danger presented. Law enforcement organizations and training academies operate at all levels, from local to international jurisdictions, to set standards for training and conduct and improve law enforcement response. Since at least 1987, with the introduction of the “Memphis Model” Crisis Intervention Team ([CIT]; developed in response to the shooting death of a mentally ill person by a Memphis police officer), there has been increasing training for officers to help them better understand and respond to individuals who are experiencing mental health crisis. The CIT model has become the gold standard for such interventions, and CIT programs have been developed in jurisdictions throughout the country, including several jurisdictions in Virginia.<sup>1</sup> Local programs are organized under the Virginia Crisis Intervention Team Coalition and are also coordinated through a partnership with the Virginia Department of Behavioral Health and Disability Services’ Office of Forensic Services.

Despite these developments toward increased law enforcement professionalism, in the last two years a number of high profile police shooting deaths, most involving African American victims, have exposed an unfortunate reality—too many of the nation’s officers are not adequately trained, and are using force, including lethal force, inappropriately. Significantly, as the Washington Post noted in its 2015 investigation of fatal police shootings, one-fourth of the 462 fatal police shootings documented by the Post in the first half of 2015 were of individuals reported by either family or the police (or both) to be mentally ill. In 45 of the 124 fatal shootings of persons with mental illness, the police were actually responding to a call to help someone get treatment, “or after the person had tried and failed to get treatment on his own.” The Post article quotes Richard Wexler, executive director of the Police Executive Research Forum, as saying, “This is a national crisis. We have to get American police to rethink how they handle encounters with the mentally ill. Training has to change.”

It was in this context that in March of 2015 the U.S. Supreme Court heard the case of Teresa Sheehan (*City & Cnty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 1765 (2015)), a woman with mental illness who was shot and almost killed by San Francisco police

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<sup>1</sup> As of July 1, 2015, 26 programs are “operational” across Virginia, 6 are “developing,” 6 are “in planning,” and 2 counties have no CIT program. Reportedly, 28 “Assessment Site Programs” have been established and 32 “Assessment Site locations” are active around the Commonwealth.

officers who had been sent to transport her to a psychiatric hospital. (See the DMHL summary of the case and of argument before the Supreme Court in the April 2015 issue).

### *The Sheehan Case*

In 2008, Ms. Sheehan, who has schizoaffective disorder, was living in San Francisco in a group home for persons with mental illness. She reportedly stopped taking her prescribed medications for a period of 18 months, and her condition and behavior began to deteriorate. At one point she refused to come out of her room, and the counseling supervisor at the home used a key to enter her room. After the supervisor entered, Ms. Sheehan rose from her bed, screaming at the supervisor that he get out of her room, that he did not have a warrant, that she had a knife (not seen at the time by the supervisor, but later described by Ms. Sheehan's counsel as a "bread cutting knife"), and that she would kill him if she "had to."

The counseling supervisor, whose mental health certification authorized him under California law to secure a "5150 hold" for Ms. Sheehan to be temporarily psychiatrically hospitalized, filled out the required documentation for that hold. He called the police department (at its nonemergency number) and asked for officers to transport Ms. Sheehan to the hospital.

The two officers who arrived were briefed by the counseling supervisor on Ms. Sheehan's condition and behavior. After knocking on Ms. Sheehan's door and announcing themselves, they entered Ms. Sheehan's room, and Ms. Sheehan again rose up from her bed, grabbed the knife, and started walking toward the officers, yelling for them to leave, that she did not want their help and threatening to kill them if they came near her. The officers drew their guns but stepped back out of the room into the hallway. Ms. Sheehan shut the door and made no attempt to follow. The officers called for backup.

As noted by Ms. Sheehan's counsel on brief to the Supreme Court the San Francisco Police Department's training and standards for its officers in 2008 for dealing with individuals with emotional disturbance instructed officers, among other things, to "contain the subject and respect the comfort zone of the subject, "use time to their advantage because the longer an encounter is allowed to occur, the better the chance of a successful and safe resolution," and "employ nonthreatening verbal communication and open-ended questions to facilitate the subject's participation in communication." In addition, the department's policy on "barricaded suspect incidents" states that (regardless of the known mental status of the suspect) "in the event a suspect resists arrest by barricading himself, and normal police procedures fail to bring about his arrest, it is the policy of the San Francisco Police Department to use hostage negotiators to attempt a negotiated surrender."

Despite their training and standards, and before the backup officers they had requested could arrive, be briefed and deployed, the officers re-entered Ms. Sheehan's room, this time to arrest her for her threatening behavior. Ms. Sheehan reacted to the re-entry just as

she had to the previous two entries, but this time the officers did not retreat. As Ms. Sheehan came toward them, “bread-cutting knife” in hand, they pepper-sprayed her and then shot her five times at point-blank range. Remarkably, Ms. Sheehan survived the shooting—a shooting administered by officers whose original mission had been to transport her to a psychiatric hospital—but she did suffer permanent physical injuries.

Ms. Sheehan filed suit under 42 U.S.C. §12132 and §1983 against the officers and the city, making two primary claims. Ms. Sheehan claimed under Title II of the Americans with Disabilities Act ([ADA]; i.e. §12132), that the officers were legally obligated to take Ms. Sheehan’s known mental disability into account in determining how to safely carry out the service they were rendering to her (initially, to transport her to the hospital; later, to arrest her). In failing to make “reasonable accommodation” to her mental illness as required by the ADA, the officers violated the Act. Under §1983, Ms. Sheehan claimed that the officers violated her Fourth Amendment right against unreasonable search and seizure when, knowing her condition and how she responded to their first entry into her room, the officers re-entered, violating their own department’s standards and their training and provoking a clearly foreseeable response that prompted her near-fatal shooting.

### **Federal District Court**

The federal district court granted summary judgment to the officers. In regard to the claim of violation of the ADA, the district court, relying on language from a 5th Circuit case, ruled that the ADA does not apply to an “officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.” In regard to the Fourth Amendment violation claim, the district court ruled that the officers were entitled to “qualified immunity,” as there was no case law existing at the time of the incident that established that conduct of this kind violated the Fourth Amendment.

### **9th Circuit Court of Appeals**

Ms. Sheehan appealed. The 9th Circuit affirmed in part, holding that the officers were justified in entering Ms. Sheehan’s room without a warrant the first time, under the “emergency aid” exception. However, the 9th Circuit found that there were “triable issues of fact” with regard to the second entry into Ms. Sheehan’s room.

On the ADA claim, the 9th Circuit rejected the argument that the ADA does not apply to a situation like Ms. Sheehan’s, finding instead that the reasonable accommodation requirement of Title II of the ADA applies to arrests. The court held that there was a triable issue as to whether the officers failed to reasonably accommodate Ms. Sheehan’s known mental disability in carrying out their arrest of her in that second entry.

On the Fourth Amendment claim, the 9th Circuit ruled that the officers were not entitled to qualified immunity because, at the time of their actions in 2008, it was settled case law

in the 9th Circuit that officers could be liable for otherwise lawful use of deadly force to defend themselves when they intentionally or recklessly “provoke” a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation. Sheehan, the Court ruled, had presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by unreasonably forcing their way back into her room.

Of particular significance in the 9th Circuit’s opinion is the way it described the central dilemma presented by this incident. In the opening paragraph of its decision, the Court wrote:

This case involves a near fatal tragedy in which police officers attempted to help a mentally ill woman who needed medical evaluation and treatment but wound up shooting and nearly killing her instead. They did so after entering her home without a warrant, causing her to react with violent outrage at the intruders. Fundamentally at issue is the constitutional balance between a person’s right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but in a way that does not turn the intended beneficiary into a victim or a criminal.

## **U.S. Supreme Court**

With one notable exception, that understanding of this tragic incident was nowhere to be found in the deliberations of the U.S. Supreme Court when it considered the appeal by San Francisco from the 9th Circuit’s decisions. Cristian Farias, in a March 25, 2015 [article](#) in *Slate* on-line magazine, entitled “Reasonable Accommodations: Do the Lives of the Mentally Ill Matter to the Supreme Court?”, made the following observations of the March, 2015 oral argument before the Supreme Court on the *Sheehan* case:

The justices’ and police advocates’ numerous references to “armed and violent,” “direct threats,” and “public safety”—without a mention of Sheehan’s diagnosis, that she was off her meds, or that the situation could’ve been de-escalated by nonviolent means—will no doubt play a part in calculations of the “reasonableness” of the officers’ conduct.

Later in his article, Farias remarks on the response by Justice Sotomayor to “a ridiculous scenario [proffered by counsel for San Francisco] that portrayed Sheehan as a conniving outlaw ready to ambush the responding police...”:

Sotomayor pondered whether the law was designed *precisely* to prevent these terrible assumptions about people with mental illnesses. That the law’s purpose was to give them a “chance” in the worst-case scenario, much like officers are given the benefit of the doubt in the wake of a civilian shooting.

“Unless we want a society in which the mentally ill are automatically killed,” Sotomayor said, before delving into statistics about the hundreds of mentally ill

persons who are killed by police officers each year, contrasted with the far fewer officers who are killed under similar circumstances. “Isn’t the ADA ... intended to ensure that police officers try mitigation in these situations before they jump to violence?” she asked.

Ultimately, that question was left unanswered because the Court did not rule on the applicability of the ADA to arrests. Although San Francisco had argued at the district and circuit court levels, and in its appeal to the Supreme Court, that Title II of the ADA does not apply when a law enforcement officer faces an “armed and dangerous individual,” on brief San Francisco conceded that the ADA *is* applicable, but that Ms. Sheehan was not “qualified” for an accommodation because she “pose[d] a direct threat to the health or safety of others” that could not “be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services” (see 28 CFR §§35.139(a), 35.104, part of the implementation regulations of the ADA). Because this new argument on brief was not made in the lower courts, the Supreme Court found that *certiorari* was “improvidently granted” and remanded the issue back to the 9th Circuit.<sup>2</sup>

Regarding the Fourth Amendment claim, the Supreme Court reversed the 9th Circuit’s ruling that the officers were not entitled to qualified immunity. The Court found, contrary to the ruling of the 9th Circuit, that it was *not* settled case law at the time of the incident that the officers’ conduct constituted an unreasonable use of force under the Fourth Amendment. In light of this ruling, there was no need for the Court to discuss what, if any, modifications to police conduct are required under the Fourth Amendment when arresting someone with mental illness.

### ***The Department of Justice and the Standards for Law Enforcement Officers’ Conduct toward Persons with Mental Illness***

#### **The Department of Justice position in *Sheehan***

A number of *amicus* briefs were submitted to the Supreme Court by organizations supporting Ms. Sheehan and organizations supporting San Francisco.<sup>3</sup> The brief offered by the United States government is of particular interest because of the authority of the United States Department of Justice (DOJ) to conduct investigations and bring legal action in response to claims that state or local law enforcement agencies have violated the civil rights of persons in their jurisdictions. (The DOJ’s recent investigation and actions in regard to the Ferguson, Missouri Police Department is a prominent example.) The

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<sup>2</sup> The Court noted that “San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that § 12132 applies to arrests,” but also explicitly pointed out that the applicability of Title II of the ADA to arrests “is an important question that would benefit from briefing and adversary presentation.” As San Francisco had argued below, and Justice Scalia noted in his partial dissent, there may be a circuit split as to whether, or at least how, § 12132 applies to arrests.

<sup>3</sup> The full briefs, along with the parties’ pleadings, the Court’s decision and a timeline for all the activities on appeal, can be found [here](#) on SCOTUSblog.

DOJ's Office of the Solicitor General (SG) also submitted a brief in *Sheehan*. First, the SG argued that the ADA clearly *does* apply to arrests, and that the Court should remand the case to the lower court to develop the factual record needed to determine how Ms. Sheehan's condition and conduct and the officers' responses fit under the ADA's standards (a record that did not exist because San Francisco had originally argued, and the district court had agreed, that the officers' conduct was *not* subject to ADA standards). Second, the SG argued that the officers in *Sheehan* were entitled to qualified immunity because case law had not clearly established by 2008 that actions of the kind taken by the officers against Ms. Sheehan violated the Fourth Amendment. Notably, the SG specifically left open the question of whether similar actions, if taken by law enforcement officers today, would violate the Fourth Amendment, but the SG argued that *Sheehan* for a variety of reasons was not the appropriate case for establishing the scope of Fourth Amendment protections in encounters of this kind.

### **Department of Justice "Pattern or Practice" Investigations Regarding Law Enforcement Officers' Encounters with Persons with Mental Illness**

Significantly, the DOJ Civil Rights Division has in recent years completed civil rights investigations of several cities' police departments in which the DOJ has specifically reviewed police practices involving officers' encounters with individuals with mental illness. A particular focus has been on police patterns and practices that violate the Fourth Amendment rights of these individuals to be free from unreasonable search and seizure, and in particular to be free from the excessive use of force. Two of the most notable investigations resolved by the DOJ through settlement agreements have been with the City of Portland, Oregon (in 2014) and the City of Cleveland, Ohio (in 2015).

As described in an August 29, 2014 DOJ [press release](#), the DOJ opened an investigation in Portland in 2011 in response to claims that the Portland Police Bureau (PPB) was engaging in "unconstitutional or unlawful policing through the use of excessive force." A "specific focus" of the investigation was on the PPB's use of force "against people with actual or perceived mental illness or in mental health crisis." The investigation was initiated under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which "authorizes the United States to file legal action when it has reasonable cause to believe that a law enforcement agency is engaging in activities that amount to a pattern or practice of violating the Constitution or laws of the United States."

In a [findings letter](#) dated September 12, 2012, the DOJ found "reasonable cause to believe that PPB engages in a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness," in violation of the Fourth Amendment of the U.S. Constitution.

Investigations under § 14141 seek evidence of unconstitutional police practices; therefore, investigation of police arrest practices is structured after the "objectively reasonable" analysis employed by courts. In particular, the DOJ's assessment of the use of force in police encounters with persons with mental illness included examination of whether the PPB officers took the person's mental condition into account when taking

action, whether less intrusive alternatives were available, whether proper warnings were given, and whether, at one or more points in the total encounter—rather than just at the moment the officers decided to use force—the officers took actions that needlessly or unreasonably escalated the situation, resulting in the subsequent use of force. Through such analysis, the DOJ found that although “most uses of force...reviewed were constitutional,” there was “a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness.”

In its review of PPB practices, the DOJ found that officers often failed to “adequately consider a person’s mental state before using force,” with the nature of the officers’ initial encounter with the individual in crisis frequently causing a foreseeable and preventable escalation in that individual’s behaviors, leading to the excessive use of force by the police against the person. Ultimately, the DOJ found that PPB officers (1) too frequently used a higher level of force than necessary; (2) used electronic control weapons (“ECWs”), commonly referred to as “Tasers,” in circumstances when such force is not justified, or deployed ECWs more times than necessary on an individual; and (3) used a higher degree of force than justified for low-level offenses. In addition, the DOJ found that the PPB failed to provide adequate training, supervision or policy guidance to officers in regard to the officers’ management of encounters with individuals experiencing mental health crisis.

Portland and the DOJ entered into a settlement agreement that includes provisions for reform measures in regard to use of force, officer training, crisis intervention (including the establishment of a “Memphis Model Crisis Intervention Team”), officer accountability and employee management reforms (particularly to identify and address officers who repeatedly use force in encounters of this type), community engagement, and creation of a community oversight advisory board. Significantly, the DOJ noted in its findings letter that a major source of problems with the PPB came from the inadequacies in the Oregon mental health system. As a result, the agreement also notes that, although state and local mental health service agencies were not parties to the litigation or the agreement, the agreement was based in part upon an expectation of improved and integrated community-based mental health services to reduce mental health crises and improve responses when crises did occur.

The agreement was later approved by the federal district court as settlement of litigation filed by DOJ, and, under the order, the Court continues to review implementation of the agreement. The City and the PPB have continued to implement the agreed reforms, including the hiring of consultants to act as the city’s compliance officer/community liaison, the creation of a civilian oversight advisory board, and the PPB’s promulgation of a new “Mental Health Response” directive (found here), setting out a policy and procedures that emphasize collaboration with mental health providers, de-escalation of high tension situations (with “non-engagement,” “disengagement” and “delaying custody” as appropriate tactics to avoid escalation), and review of responses to ensure appropriate practices are used.



The settlement agreement with Cleveland (found [here](#)), which addressed a wider array of problems in the Cleveland Police Department, has similar provisions for reforming police responses to persons in mental health crisis, including the creation of a Mental Health Response Advisory Committee, the hiring of a Crisis Intervention Coordinator, the training of all officers in proper mental health crisis response and the enhanced specialized training of a group of “specialized CIT officers.”

### ***The Evolution of a New Standard for Law Enforcement Conduct***

It appears, then, that the Department of Justice, through its civil rights investigations and settlement actions, is helping to fashion a new standard of practice in law enforcement’s understanding of, and interventions with, individuals with mental illness, and, with that new standard of practice, a new understanding of what the Fourth Amendment requires in regard to the use of force by police. Given what the public is now learning about the actual use of deadly force by police departments across the country, particularly in police encounters with African Americans and with people who have mental illness, the need for such a new standard is becoming increasingly clear. Virginia localities are among those still needing this change. As an example, a year ago the fatal shooting by a Norfolk police officer of a man with serious mental illness prompted department-wide CIT training<sup>4</sup> by the Norfolk police to improve officers’ response to persons with mental illness.

To date, no new guidance for law enforcement in this challenging area of practice has been provided by the U.S. Supreme Court. The oral argument before the Supreme Court in March in the *Sheehan* case suggests that the Supreme Court may not yet see a need for new and clearer Fourth Amendment (and ADA) standards in regard to law enforcement’s encounters with persons with mental illness. As the fatal shootings by police of persons with mental illness seem to continue unabated across the country, it appears certain that cases will arise in which the Court will again be asked to rule on the standard of conduct required of officers by the ADA and the Fourth Amendment in encounters with persons with mental illness. It can only be hoped that the Supreme Court extends to the victims in those future cases the same regard for their humanity as the 9th Circuit Court of Appeals extended to Teresa Sheehan, and as the Department of Justice appears to be extending to persons with mental illness in jurisdictions throughout the nation. Much depends upon it.

## **II. Commentary**

### **The Constitutional Importance of Conforming to Accepted Professional Practice in Adjudicating Claims of Intellectual Disability in Capital Cases: A Comment on *Hall v. Florida*, 134 S. Ct. 1986 (2014)**

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<sup>4</sup> That shooting also resulted in the indictment of the officer by a special grand jury for voluntary manslaughter.

## Richard J. Bonnie

In *Atkins v. Virginia*, 535 U.S. 304 (2002), the Supreme Court held that the Fourteenth and Eighth Amendments to the U.S. Constitution forbid the execution of individuals with intellectual disabilities. After that decision, Freddie Lee Hall asked a Florida state court in a post-conviction proceeding to vacate his death sentence based on evidence that he had an IQ of 71. *Hall v. Florida*, 134 S.Ct.1986, 1988 (2014). The state court denied his petition, holding that the relevant Florida statute required a petitioner to show that he had an IQ of 70 or below before being allowed to present mitigating intellectual disability evidence. The Florida Supreme Court affirmed, upholding the constitutionality of the Florida statute. *Hall v. State*, 109 So. 3d. 704 (2013).

The Florida statute at issue defined “significantly subaverage general intellectual functioning” as “performance that is two or more standard deviations from the mean score on a standardized intelligence test”— i.e. 70 or below. Florida treated 70 as a mandatory cutoff, meaning that if a petitioner tested above that number “sentencing courts [could not] consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.” *Hall v. State*, 134 S.Ct. 1986, 1994 (2014).

Acknowledging the “inherent error in IQ testing,” the Supreme Court reversed the Florida Supreme Court, holding the strict 70 point cutoff unconstitutional because it created an unacceptable risk that persons with intellectual disabilities would be executed in violation of the Eighth and Fourteenth Amendments. In closing, the Supreme Court stated that a bright-line cutoff rule “is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, [a bright-line cutoff] not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning.”

In the course of its opinion, the Supreme Court lists Virginia as being one the states that had unconstitutionally drawn a clear IQ cut-off at 70, based on the decision of the Virginia Supreme Court in *Johnson v. Virginia*, 591 S.E. 2d 47, 59 (2004). For our Virginia readers, I would like to summarize the historical record bearing on the issue decided by the Virginia Supreme Court in *Johnson*. I respectfully contend that the Court's decision in *Johnson* misinterpreted the relevant language in the statute. Moreover, it is important for trial courts to understand the determinative role played by scientific knowledge and accepted professional practice in the adjudication of *Atkins* claims.

The Virginia statute governing the adjudication of *Atkins* claims was drafted by the Crime Commission based on a report prepared by an expert Clinical Advisory Group (CAG) that I chaired for the Crime Commission. In an article published in the *University of Richmond Law Review* in 2007, Katherine Gustafson and I reviewed the drafting

history and the relevant scientific and professional literature, showing that the statutory language referring to IQ testing was intended to incorporate standard professional practice, including recognition of the standard error of measurement in interpreting IQ scores. See Richard J. Bonnie and Katherine Gustafson, *Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICHMOND L. REV 811 (2007). Excerpts from that article follow (original footnotes omitted):

### ***Interpretation of IQ Scores***

According to the definition of mental retardation in the Virginia statute, “significantly subaverage intellectual functioning” must be “demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean.”<sup>5</sup> In addition, the statute directs that “[t]esting of intellectual functioning shall be carried out in conformity with accepted professional practice.”<sup>6</sup> These two provisions are perhaps the most important provisions in the statute because they import standard practices of administering, scoring, and interpreting IQ tests into the law. ...

For the purposes of this section regarding the interpretation of IQ scores, we will assume that “significantly subaverage intellectual functioning” ... is operationalized as a score of 70 or below on a specific IQ test. That is often the case, given that a score of 70 is typically two standard deviations below the mean on a test designating a score of 100 as the mean. This assumption, and the question of whether the law should explicitly establish a cut-off IQ score for mental retardation (as many states do), will be discussed later in this paper. ...

All measurement, both physical and psychological, has some potential for error. For example, when someone’s height is being measured, the result will be influenced by many factors including the particular tool being used, the eyesight of the measurer, the care taken by the measurer, and whether the person being measured is wearing shoes or slouching. Psychological testing has even greater potential for error because it is more subjective. Error may be introduced by the examiner making a timing mistake, failing to record responses, over-prompting, mishandling stimuli objects, or neglecting to repeat parts of the instructions. Error may also be introduced by the defendant’s mood and general health, luck, or other undetermined factors. In any kind of measurement there are always tradeoffs between cost and accuracy.

*Standard error of measurement (SEM)* helps to quantify the errors in

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<sup>5</sup> VA. CODE ANN. § 19.2-264.3:1.1(A).

<sup>6</sup> VA. CODE ANN. § 19.2-264.3:1.1(B)(1).

intelligence tests in order to facilitate the most accurate interpretation and presentation of scores. Both the [American Association on Mental Retardation (AAMR)]<sup>7</sup> and the [American Psychiatric Association (APA)] definitions of mental retardation stress the importance of considering SEM when evaluating IQ scores. SEM varies between measures and between age groups within each measure. Each measure is accompanied by a table of calculated SEMs by age group. Generally, SEM is estimated to be between three and five points for well-standardized IQ tests. ...

[T]he SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests. The importance of the SEM is so well-established in the field that it would be superfluous to direct experts to take it into account in a statute governing *Atkins* evaluations and adjudications, and most state laws say nothing about it. Nonetheless, in its effort to provide as much guidance as possible to courts, the proposal drafted by the Clinical Advisory Group explicitly stated that SEM must be considered in *Atkins* cases, as did the initial drafts of the bill in the *Atkins* subcommittee. In the course of the subcommittee and Crime Commission deliberations, prosecutors proposed that specific reference to SEM be omitted on the ground that this would simplify the scientific language of the bill. However, the CAG representatives urged the subcommittee and the Crime Commission to retain the SEM language in order to emphasize that any IQ score actually represents a range of possible scores. The Crime Commission proposal as passed by the Senate included the CAG's reference to the SEM in the definition of mentally retarded:

“Mentally retarded” means a disability . . . characterized . . . by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning carried out in conformity with accepted professional practice, that is at least 2 standard deviations below the mean, *considering the standard error of measurement for the specific instruments used....*

However, the reference to the SEM was deleted from the version of the *Atkins* bill passed by the House of Delegates and was then omitted in the bill approved by the joint conference committee. [Together with other Crime Commission drafters of the bill, I] decided to acquiesce in this amendment on the ground that the omitted language, though desirable, was not necessary. As noted above, the requirement that intellectual functioning be assessed in conformity with accepted professional practice mandates the consideration of the SEM. As a matter of professional practice, experts will have to testify

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<sup>7</sup> Since publication of the quoted article, the AAMR has revised its name to American Association on Intellectual and Developmental Disabilities.

about why they think a particular score indicates that a defendant's performance on a specific measure was at least two standard deviations below the mean. Ensuring that forensic experts and lawyers sufficiently understand the importance and effects of SEM thus becomes a matter of training. ...

### ***Cut-Off Scores***

For purposes of the preceding discussion of the role of standard error of measurement..., and other factors affecting the interpretation of IQ scores, we have assumed that “significantly subaverage intellectual functioning” is operationalized as scoring 70 or below on a specific IQ test. While this is a useful assumption to make when explaining the effects of factors like standard error of measurement, a score of 70 or below (or any other specific cut-off score) should not be embraced by courts or state legislatures as a part of the definition of mental retardation. Instead, a significant limitation in intellectual functioning should be defined as performance that is at least two standard deviations below the mean, as both the AAMR and the APA recommended, and the Virginia statute provides.

The *standard deviation* measures the variation of scores in comparison to the mean score of the population on which the test has been normed. Two-thirds of the population will have scores falling within one standard deviation on either side of the mean, and 95 percent of the population will have scores falling within two standard deviations on either side of the mean. The [Wechsler Adult Intelligence Scale—Third Edition] and the [Stanford-Binet Intelligence Scales, 5<sup>th</sup> Edition] both have a mean score of 100 and a standard deviation of 15. Two-thirds of the population will thus have a score between 85 and 115 (one standard deviation) and 95 percent of the population will have a score between 70 and 130 (two standard deviations). Consequently, an IQ score of 70 is sometimes used as a proxy for a score two standard deviations below the mean, but the score of 70 should not be reified.

Standard deviations should be used in the definition and diagnosis of mental retardation instead of cut-off scores for a number of reasons. First, different IQ tests use different scoring norms, meaning that the mean score does not necessarily have to be set at 100. ... Second, different IQ tests may have different standard deviations. ... Third, a fixed cut-off score would ignore the fact that different IQ tests have different standard errors of measurement (SEM). Given the inevitable presence of some measurement error, each IQ score should actually be viewed as a range of possible scores. ... Fourth, IQ tests are generally most accurate with respect to people who fall within two standard deviations of the mean. Since people with mental retardation by definition fall outside this group, their scores are somewhat less trustworthy than those closer to the mean. Although this decrease in confidence as IQ scores approach high or low extremes certainly does not discredit the validity of extreme scores, it does highlight the importance of viewing the diagnosis of

mental retardation as involving clinical judgment and evaluation of all three diagnostic criteria (intellectual functioning, adaptive behavior, and age of onset). Establishing a fixed cut-off score would ignore the role of clinical judgment in the diagnosis of mental retardation.

In addition to these scientific objections to using a cut-off score, such scores are also objectionable on legal grounds. Focusing on a “number” implies that the diagnosis of mental retardation is more mechanical and more objective than it really is, and tends to obscure the inevitable clinical factors that affect performance on standardized cognitive measures. ... Ultimately, in cases on the margin, experts need to exercise their own judgment, as do judges and juries. ... Courts and juries can hear testimony from experts on both sides to...determine for themselves whether a defendant has the requisite intellectual deficits and whether he is mentally retarded when all three components of mental retardation are considered.

In *Johnson v. Virginia*, the Supreme Court of Virginia incorrectly observed that...the defendant’s “scores of 75 and 78 on these I.Q. tests exceed the score of 70 that the General Assembly has chosen as the threshold score below which one may be classified as being mentally retarded.” 591 S.E.2d 47, 59 (Va. 2004). The General Assembly did not establish 70 as a threshold score. See VA. CODE ANN. § 19.2-264.3:1.1(A) (Repl. Vol. 2004). It referred to a score that is at least two standard deviations below the mean as a threshold score. As we have explained above, this is not a trivial distinction.

The Supreme Court’s decision in *Hall* makes it clear that the Eighth Amendment requires that judicial determinations of intellectual disability conform to scientific knowledge and accepted clinical practice. Judges would be well-advised to keep this injunction in mind when ruling on all evidentiary and substantive issues arising in the adjudication of *Atkins* cases.

### III. ILPPP Data Corner

Given the focus of the feature article in this issue, the inaugural *ILPPP Data Corner* presents data on adults who were in police custody at the time they were evaluated to determine whether they appeared to meet inpatient commitment criteria for the purposes of securing a temporary detention order (TDO). Data were gathered in April 2013 as part of a larger study of such evaluations conducted in Virginia.

“Adults in police custody at the time of evaluation” includes several types of cases, such as cases in which officers initiated the evaluation, cases in which officers became involved through executing an emergency custody order and transporting the individual for evaluation, etc.

**Table 1. Proportion of evaluated adults in police custody, by region**

Region	Total Cases	Number of Cases in Police Custody	% Cases in Police Custody
Northwestern	700	221	31.6%
Northern	551	166	30.1%
Southwestern	462	91	19.7%
Central	495	145	29.3%
Eastern	793	213	26.9%
Southern	274	57	20.8%
Catawba	161	65	40.4%
<b>Total</b>	<b>3,436</b>	<b>958</b>	<b>27.9%</b>

**Table 2. Demographic characteristics of adults in police custody at the time of the evaluation**

For comparison, descriptive data for evaluated adults not in custody and for all Virginia adults are provided when available.

	Evaluated adults in police custody (n = 958)	Evaluated adults not in police custody (n=2,478)	Adults in Virginia (n = 6,244,639) <sup>a</sup>
<b>Median age in years</b>	39	39	37.5 <sup>b</sup>
	% (n) <sup>c</sup>	% (n)	% (n)
<b>Male</b>	56.0 (524)	47.5 (1,150)	48.5 (3,030,663)
<b>Race/Ethnicity:</b>			
Caucasian	67.4 (624)	66.6 (1,610)	66.9 (4,173,835)
Black or African American	26.1 (244)	25.3 (613)	18.6 (1,159,700)
Hispanic and/or Latino	2.8 (26)	3.6 (86)	7.2 (446,705)
Multi-race	1.8 (17)	1.5 (37)	
Asian	1.3 (12)	1.5 (37)	5.7 (353,900)
Other	0.3 (3)	1.5 (36)	
<b>Military status:</b>			
Active/Reserve	1.1 (10)	0.4 (10)	1.4 (88,269) <sup>d</sup>
Veteran	16.7 (156)	13.5 (322)	11.6 (726,470)
None	72.2 (673)	76.5 (1,829)	-
Unknown	9.7 (93)	9.6 (229)	-

<sup>a</sup> These data were obtained from the [U.S. Census QuickFacts webpage for Virginia](#) and the [U.S. Census Voting Age Population by Citizenship and Race \(CVAP\) webpage](#).

<sup>b</sup> Data on the median age of adults in Virginia were not readily available. This figure represents the median age of all Virginians, including those under the age of 18.

<sup>c</sup> Percentages reported were calculated after removal of missing cases for each variable; therefore, number of cases (n) is also reported for each variable.

<sup>d</sup> This is the figure for 2009, the most recent year readily available. It was obtained from the [Census 2012 Statistical Abstract of the United States](#).

**Table 3. Clinical characteristics of evaluated adults, by police custody status**

	Evaluated adults in police custody (n=958)	Evaluated adults not in police custody (n=2,478)
	% (n)	% (n)
<b>Any mental illness</b>	89.6 (858)	88.8 (2,200)
<b>Primary diagnosis:</b>		
- <b>Mood Disorders</b>		
o Depression	19.6 (188)	26.4 (654)
o Mood disorder, NOS	6.8 (65)	6.1 (150)
o Anxiety/PTSD	3.2 (31)	5.3 (131)
o Bipolar disorder	13.4 (128)	12.9 (320)
o Adjustment disorder	2.2 (21)	1.9 (47)
- <b>Psychotic Disorders</b>		
o Schizophrenic disorder	13.6 (130)	11.5 (286)
o Psychotic disorder	6.9 (66)	5.2 (130)
o Delusional disorder	0.8 (8)	0.7 (18)
- <b>Substance-Related Disorders</b>		
o Alcohol dependence	1.0 (10)	0.4 (10)
o Drug dependence	0.5 (5)	0.3 (7)
- <b>Dementia</b>	1.9 (18)	2.3 (57)
- <b>Other</b>	19.6 (188)	27.0 (668)
<b>Any substance abuse/use disorder</b>	32.8 (314)	30.5 (757)
<b>Dual diagnosis (mental illness and substance abuse/use disorder)</b>	26.8 (257)	22.3 (553)

**Table 4. Risk of harm to self or others in evaluated adults, by police custody status**

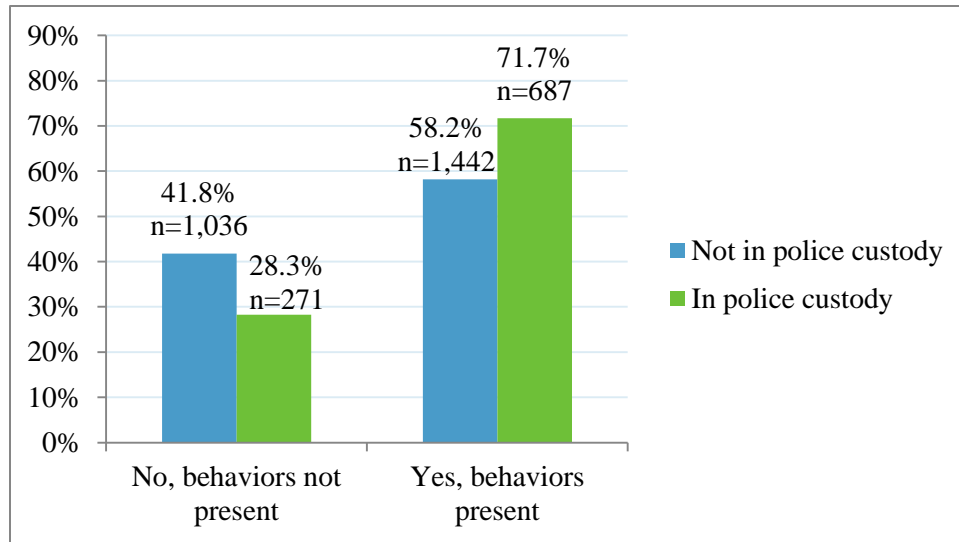
Related statistical comparisons and accompanying figures follow this chart.

	Adults under police custody (n=958)	Adults not under police custody (n=2,478)
	% (n)	% (n)
<b>Individual exhibited behaviors indicating risk of harm to self or others</b>	71.7 (687)	58.2 (1,442)
<b>Clinician opined that individual met commitment criteria for harm to self or others</b>	59.0 (562)	42.5 (1,047)
<b>Individual owns or has easy access to firearm:</b>		
- Yes	10.2 (98)	5.4 (135)
- No	61.0 (584)	68.4 (1,695)
- Unable to determine	28.8 (276)	26.2 (648)



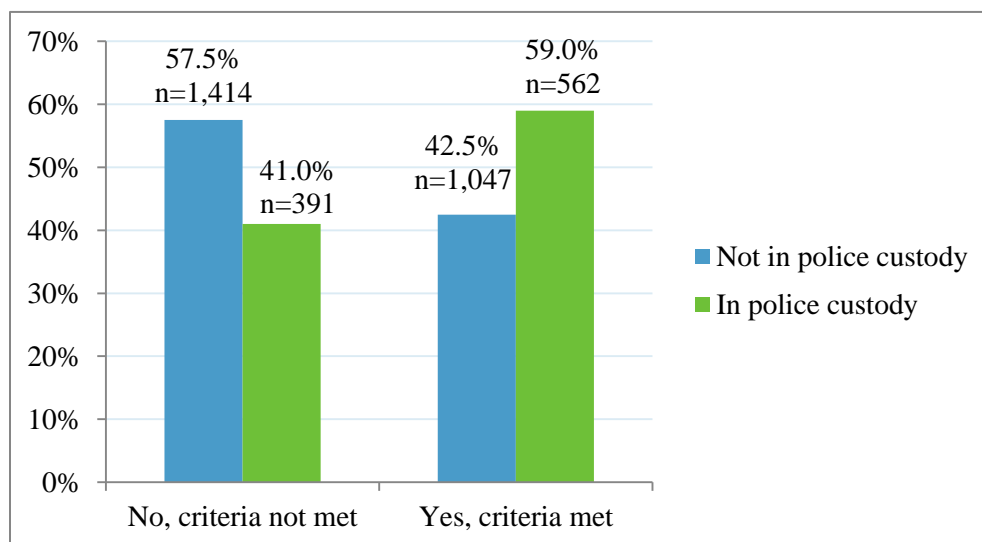
Proportionately more individuals evaluated in police custody displayed behaviors indicating an elevated risk of serious physical harm toward self or others than individuals not in police custody (71.7% vs. 58.2%,  $\chi^2(1) = 53.58$   $p < .0001$ ,  $\Phi_{\text{Cramer}} = 0.125$ ).

**Figure 1. Presence of behaviors bearing on involuntary commitment criteria for harm to self or harm to others, by custodial status**



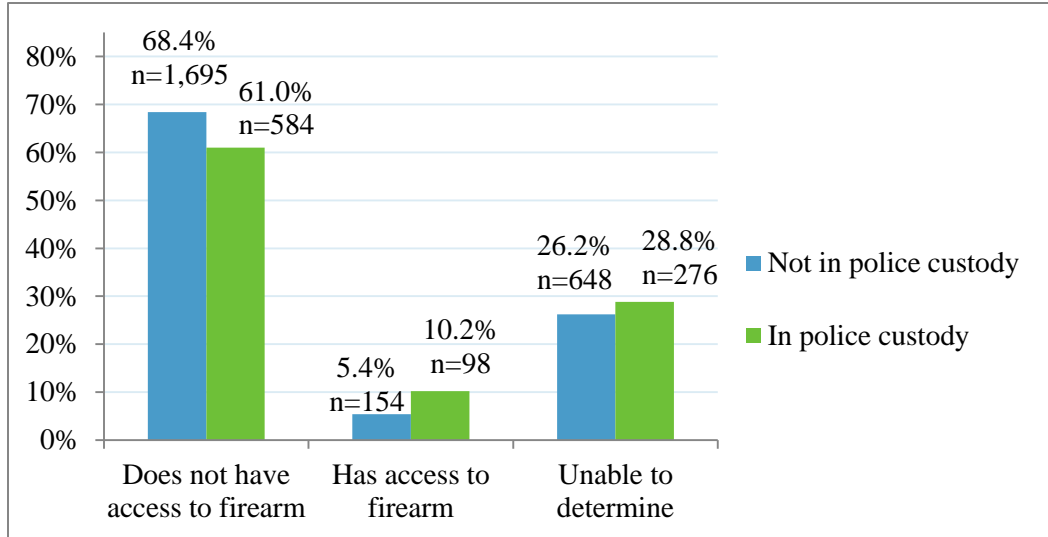
Clinicians opined that the individual met commitment criteria for harm to self or others for proportionately more individuals evaluated in police custody than individuals not in police custody (59.0% vs. 42.5%,  $\chi^2(1) = 74.41$   $p < .0001$ ,  $\Phi_{\text{Cramer}} = 0.148$ ).

**Figure 2. Clinician opinion regarding whether the individual met commitment criteria for harm to self or others, April 2013**



Proportionately more individuals evaluated in police custody owned or had easy access to a firearm than individuals not in police custody (10.2% vs. 5.4%,  $\chi^2(1) = 24.99$   $p < .0001$ ,  $\Phi_{\text{Cramer}} = 0.085$ ).

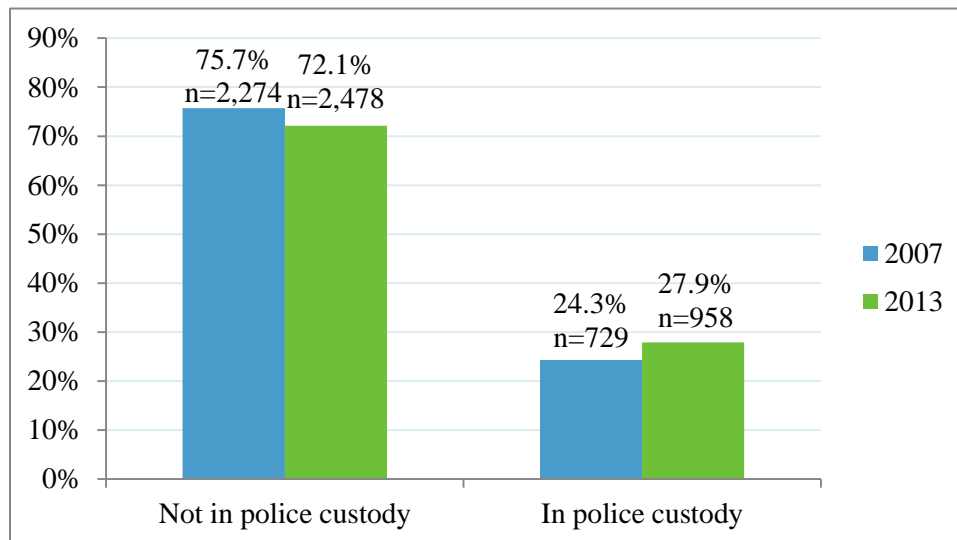
**Figure 3. Evaluated adults' access to firearms, by police custody status, April 2013**



**Proportion of adults in police custody at the time of evaluation: 2007 vs. 2013**

In 2007, a similar survey was conducted. Though questions were worded slightly differently, comparison can be made on the proportion of adults in custody during evaluation. The proportion rose slightly from 2007 to 2013 ( $\chi^2(2) = 327.85$ ,  $p < .001$ ,  $\Phi_{\text{Cramer}} = .23$ ).

**Figure 4. Evaluated adults' police custody status: 2007 vs. 2013**



## IV. Case Law Developments

### United States Supreme Court Decisions

**Death Penalty: Right of defendant convicted and sentenced to death prior to *Atkins* decision to seek review and determination of whether defendant has intellectual disability and is therefore precluded from death penalty under the Eighth Amendment**

***Brumfield v. Cain*, 135 S.Ct. 2269 (2015).**

Petitioner Kevan Brumfield was convicted of murder in Louisiana and sentenced to death before the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). A subsequent Louisiana state Supreme Court case mandated an evidentiary hearing whenever a defendant provides facts sufficient to raise a reasonable ground to believe that he has an intellectual disability. See *State v. Williams*, 831 So.2d 835 (La. 2002). Brumfield amended his state post-conviction petition to include an *Atkins* claim and sought an evidentiary hearing. The amended petition referenced evidence introduced at sentencing that Brumfield had an IQ of 75, had a fourth-grade reading level, had been prescribed medications and treated in psychiatric hospitals as a child, had been identified as having a learning disability, and had been placed in special education classes. The trial court dismissed his post-conviction petition without holding an evidentiary hearing or granting funds to conduct additional investigation. Brumfield sought federal habeas relief.

The district court granted relief under 28 U.S.C. §§ 2254(d)(1) and (2), but the Fifth Circuit reversed, holding that the state court decision was not “contrary to” and did not involve “an unreasonable application of clearly established federal law,” nor was it “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

The Supreme Court vacated and remanded, holding as unreasonable under § 2254(d)(2) the state trial court’s determinations that 1) Brumfield’s IQ score was inconsistent with a diagnosis of intellectual disability and 2) he presented no evidence of adaptive impairment. Although the record contained some contrary evidence, that evidence did not foreclose all reasonable doubt as to Brumfield’s intellectual disability. The facts raised at sentencing were sufficient to raise doubt concerning Brumfield’s impairments. The Supreme Court held that Brumfield had “cleared [§ 2254(d)’s] procedural hurdles” and so was entitled to an evidentiary hearing to show his intellectual disability.

**Corrections: Because no Supreme Court precedent established a right to suicide prevention protocols, corrections officials were entitled to qualified immunity in case involving claim that inmate suicide arose from facility's violation of inmate's Eighth Amendment right to appropriate suicide screening, treatment and monitoring**

***Taylor v. Barkes*, 135 S.Ct. 2042 (2015) (per curiam).**

Christopher Barkes was arrested in 2004 for violating probation and was taken to a Department of Corrections (DOC) facility in Wilmington, Delaware, where he underwent a suicide screening based on a model form developed by the National Commission on Correctional Health Care (NCCHC) in 1997 as part of intake procedures. The intake was completed by a nurse from the contractor employed by the facility (First Correctional Medical, Inc. [FCM]). Barkes stated that he had attempted suicide in 2003 and disclosed that he had a history of psychiatric treatment, but said that he was not currently contemplating suicide. The nurse gave Barkes a routine referral to mental health services and did not initiate any special suicide prevention measures. Barkes was placed in a cell by himself. He placed a call to his wife that evening and expressed his intention to kill himself, but his wife did not inform the DOC. The next morning, Barkes was observed lying on his bed at 10:45, 10:50, and 11:00 am. At 11:35 am, an officer delivered lunch to the cell and discovered that Barkes had hanged himself with a bedsheet.

The Third Circuit held that Barkes's constitutional right to "proper implementation of adequate suicide prevention tools" was clearly established at the time of his suicide. It also held that summary judgment was inappropriate given evidence that "FCM's policies and procedures...created an unreasonable risk of a constitutional deprivation" and evidence of DOC's awareness of FCM's non-compliance with NCCHC standards. Finally, it held that a reasonable jury could have found that Barkes's suicide was caused by the DOC's failure to supervise FCM despite the fact that Barkes did not self-report suicidal ideation or exhibit suicidal behavior. In the court's view, "had Appellants properly supervised FCM and ensured compliance with the national standards, Barkes's answers during his screening would have resulted in additional preventive measures being taken."

The Supreme Court reversed *per curiam*, holding that the right "to proper implementation of adequate suicide prevention protocols" was not clearly established "in a way that placed beyond debate the unconstitutionality of the [facility's] procedures." Although the Third Circuit found the right established by its own precedents, the Court emphasized that no Supreme Court decisions have established a right to proper implementation of adequate suicide prevention protocols or discussed suicide screening protocols. Thus, the defendants were entitled to qualified immunity because they were not "contravening clearly established law," even if the suicide screening and prevention measures had shortcomings.

## United States Fourth Circuit Decisions

**Forced medications to restore competency to stand trial: After prior reversal and remand, the Fourth Circuit rules that the district court made the specific inquiries and findings in the record as required by *Sell* to support the determination that less restrictive alternatives to forced medication to restore competency were not available**

*U.S. v. Chatmon*, 596 Fed.App'x 216 (4th Cir. 2015).

This case, though unpublished, provides useful guidance from the Fourth Circuit on the evidentiary foundations required to support a court order to restore a defendant to competency to stand trial through the forcible administration of medications.

Chatmon was indicted for conspiracy to distribute crack cocaine and heroin, an offense with a minimum sentence of 10 years and maximum of life imprisonment. Following submissions by his attorney that Chatmon's condition during incarceration had deteriorated to the point that he could no longer assist counsel in his own defense, Chatmon was transferred for competence evaluation to the Butner Federal Medical Center, where he was diagnosed with paranoid schizophrenia.

The district court found Chatmon incompetent to stand trial. Chatmon was returned to Butner for evaluation of whether he could be restored to competence, where he was placed in solitary confinement. The evaluation report confirmed the diagnosis, noted that Chatmon denied having any mental illness and refused treatment, and stated there was a "substantial probability" that competency could be restored through treatment with haloperidol decanoate. The government requested Court authorization to restore Chatmon to competency through forced medication.

The district court found that the government had met the test set out in *Sell v. United States*, 539 U.S. 166, 181 (2003)<sup>8</sup>, and authorized the forced medication. Chatmon appealed. In *United States v. Chatmon*, 718 F.3d 369 (4th Cir. 2013), the Fourth Circuit Court of Appeals reversed the district court and remanded the matter. The Court noted that the district court had made sufficient findings for the first, second, and fourth prongs of *Sell*, but had failed to consider less intrusive means for restoring competence. Chatmon had submitted evidence of improved behavior upon being transferred to the open population at Butner and an option of group therapy to improve competence. The

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<sup>8</sup> (1) important governmental interests are at stake and special circumstances do not sufficiently mitigate those interests; (2) involuntary medication significantly furthers the government's interests by making it substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel at trial; (3) the involuntary medication is necessary to further the government's interests, and less intrusive means are unlikely to achieve substantially the same results; and (4) the administration of drugs is medically appropriate and in the individual's best medical interests in light of the individual's medical condition.

Court also noted that a “court order to the defendant backed by the contempt power” is acceptable as a less intrusive means for administering drugs.

On remand from the Fourth Circuit, the district court ordered the defendant to take his medication or be held in civil contempt. The penalty was set as thirty days' imprisonment, during which medication was offered each day, but Chatmon declined it. The district court then reviewed deposition testimony addressing whether housing in Butner's open population and group therapy could result in restoration. The doctors opined that improvements in behavior were not the same as improved competency or mental health, and that treatments other than medication could be beneficial but not by themselves effective treatment for psychosis. They stated that haloperidol was the “only” effective means to restore Chatmon's competency. The defense offered no rebuttal to the testimony, and the district court ordered forced medication.

Chatmon appealed the district court's new order, but the Fourth Circuit found that the record created by the district court “made careful findings” and “examined less intrusive means,” thus satisfying all *Sell* factors, before ordering that Chatmon be forcibly medicated.

**ADA workplace accommodation: Claim by fired deputy clerk of court that her social anxiety disorder constituted a disability and that her employer failed to make reasonable accommodation survives summary judgment motion, as the Court emphasizes the remedial goals of the ADA**

***Jacobs v. NC Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).**

Christina Jacobs was hired as a deputy clerk in the New Hanover County Superior Court. The job description for deputy clerk included many activities, and only a few of the deputies regularly provided customer service at the courthouse front counter. Jacobs, who was diagnosed with social anxiety disorder, was assigned to provide customer service on a daily basis. She experienced extreme anxiety and distress from interacting with the public at the counter. She requested to be assigned to a role with less direct interpersonal interaction. Her employer did not respond to her accommodation request, and three weeks later fired her. She made a timely complaint to the EEOC, which conducted an investigation and made a finding in her favor. The Department of Justice later issued a “Right to Sue” letter. Jacobs filed suit, claiming, among other things, disability discrimination, failure to accommodate, and retaliation, all in violation of the Americans with Disabilities Act (ADA). After discovery, defendant employer moved for summary judgment, which the district court granted on all counts.

The Fourth Circuit reversed and remanded on all counts except the claim of retaliation. It noted that the district court's most fundamental error was deciding disputed factual issues in favor of the moving party, rather than determining whether, if the facts were as Jacobs alleged, no reasonable juror could find that the defendant had committed violations of the ADA.

The Fourth Circuit then examined the claims and facts. Some notable observations include:

1. The Court first reviewed the ADA definition of “disability” and non-exhaustive list of “major life activities” including the EEOC’s acceptance of “interacting with others” as a major life activity. Moreover, the 2008 ADA amendments broadened the definition of disability in order to expand the scope of protection available under the Act “as broadly as the text permits.” The Fourth Circuit “therefore defer[red] to the EEOC's determination...that interacting with others is a major life activity.”
2. The Court rejected the employer’s claim that Jacobs had failed to show that her alleged social anxiety disorder substantially limited her ability to interact with others. The Court noted that the 2008 amendments define a disability as one that “substantially limits...as compared to most people in the general population...An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.”
3. The Court noted that a person “need not live as a hermit in order to be” substantially limited. The fact that Jacobs endured the social interactions for a time did “not per se preclude a finding that she had social anxiety disorder,” and “a reasonable jury could conclude that Jacobs was substantially limited in her ability to interact with others and thus disabled within the meaning of the ADA.”
4. The Court ruled that at this stage of the litigation the absence of any documentation of poor performance, and the shifting reasons of the employer regarding unsatisfactory performance, were sufficient to establish that the employer’s claims were a pretext and not the actual reason for the decision to fire her.
5. The Court also analyzed whether the employer made a reasonable effort at accommodation. The Court wrote that employers have a good-faith duty “to engage [with their employees] in an interactive process to identify a reasonable accommodation” under the ADA (*Wilson v. Dollar Gen. Corp.*, 717 F.3d at 346, 4<sup>th</sup> Cir. 2013).<sup>9</sup> The Fourth Circuit found that, given the undisputed facts regarding the meeting at which Jacobs was fired, “a reasonable jury could easily conclude” that Jacobs’s employer acted in bad faith by failing to engage in the interactive process with Jacobs at that meeting.

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<sup>9</sup> See also *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6<sup>th</sup> Cir. 2014) and *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 622 (5<sup>th</sup> Cir. 2009).

## Other Federal Circuit Court Decisions

### **Competence to stand trial: State courts violated clear due process standards in failing to address defendant's competency to stand trial**

*McManus v. Neal*, 779 F.3d 634 (7th Cir. 2015).

Paul McManus was convicted in Indiana state court of murdering his estranged wife and two daughters and was sentenced to death. On state post-conviction review, a trial judge found McManus to be intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*, 526 U.S. (2002) and Ind. Code § 35-36-9-6, but the Indiana Supreme Court re-imposed the death sentence. McManus then sought federal habeas review, challenging the Indiana Supreme Court's rejection of his *Atkins* claim. The Seventh Circuit expanded the appeal to include the question of whether the state court "unreasonably applied federal due-process standards in finding McManus competent to stand trial."

The Seventh Circuit held that the trial court and state supreme court failed to follow the due process competence to stand trial standard set out in *Pate v. Robinson*, 383 U.S. 375 (1966) and *Dusky v. United States*, 362 U.S. 402 (1960). During the trial, McManus suffered several panic attacks and had to be transported to the emergency room where he was treated with several psychotropic drugs, including both opioid painkillers and ones that affected memory. The Seventh Circuit held that the "powerful effect of the medications alone created substantial doubt about McManus' mental fitness for trial" and faulted the state judge for not ordering a competency evaluation and instead focusing on "getting McManus 'fixed-up' enough to complete the trial." This course of action violated not only the due process standard set out in *Dusky* but also the Indiana Code, which requires a trial court to appoint a team of medical experts with expertise in determining competency and to hold a hearing any time there are bona fide doubts about a defendant's competency. See Ind. Code § 35-36-3-1. The Seventh Circuit reversed and remanded the case to the district court with instructions to grant the writ of habeas corpus unless Indiana gave notice of its intent to retry McManus within a reasonable time.

### **Intellectual disability determination and the death penalty: Habeas corpus relief granted to criminal defendant sentenced to death in state court system on grounds that he is ineligible for death penalty due to intellectual disability**

*Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015).

Tommy Pruitt was charged with murder, attempted murder, and related offenses in Indiana state court, and was convicted and sentenced to death. After exhausting his state post-conviction remedies, Pruitt sought federal habeas relief claiming that he was intellectually disabled and thus categorically ineligible for the death penalty. He also included several claims alleging ineffective assistance of his trial counsel, including one based on their failure to investigate and present evidence at sentencing that Pruitt suffered from schizophrenia.



The Seventh Circuit held that the Indiana Supreme Court’s “determination that Pruitt failed to demonstrate significantly subaverage intellectual functioning based on inconsistent test scores” was objectively unreasonable and contrary to the clear and convincing weight of evidence. The Indiana Supreme Court erred by relying on “inaccurate assumptions and select pieces of evidence” in its factual determination, weighing circumstantial evidence—such as Pruitt’s ability to fill out applications for employment and his other work and school history—as more indicative of his true intellectual ability than his many subaverage IQ test scores. The Court also noted that the state court record contained “unrebutted evidence that Pruitt satisfie[d] the adaptive behavior prong of intellectual disability.” The Seventh Circuit also held that trial counsel’s failure to investigate and present evidence of Pruitt’s paranoid schizophrenia was “sufficiently egregious and prejudicial” to establish ineffective assistance. Ultimately, the Seventh Circuit reversed the judgment of the district court and remanded the case for new penalty-phase proceedings.

**Intellectual disability determination and the death penalty: Request to submit “newly discovered evidence” to establish intellectual disability and ineligibility for death penalty not barred by 28 U.S.C § 2255(e) even after original appeal denied**

*Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (rehearing en banc).

Bruce Webster was convicted of kidnapping resulting in death and related offenses and was sentenced to death. These convictions and his death sentence were affirmed on direct appeal in Texas, and his motions for habeas relief, which were heard in Indiana where he resides on death row, were denied. Webster sought a rehearing *en banc* to address the question of whether he could file for a writ of habeas corpus to present new evidence demonstrating that he was categorically and constitutionally ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S.Ct. 1986 (2014). Federal prisoners who claim to be convicted or sentenced in violation of the Constitution must present a claim for relief by a motion under 28 U.S.C. § 2255. Subsection (e) generally prevents a prisoner from making an application for a writ of habeas corpus. There is, however, a savings clause in § 2255(e) that allows a prisoner to apply for a writ of habeas corpus where “it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.” A panel of the Seventh Circuit originally concluded that a claim of new evidence can never satisfy the standard in § 2255(e).

Upon rehearing *en banc*, the Seventh Circuit determined that “the savings clause [in § 2255(e)] permits Webster to resort to a [habeas] petition.” Of essential importance to the Court were the facts that “the Supreme Court has now established that the Constitution itself forbids the execution of certain people,” and that a “core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence.” The Court held that a categorical bar against the use of § 2255(e)’s savings clause in this way could lead to “the intolerable result of condoning an execution that violates the Eighth Amendment.” Conceding that this rule could not be applied to all newly discovered evidence due to finality considerations, the Court held that habeas relief was available to Webster because

the new evidence proffered existed before the time of the trial and there was evidence “indicating that [it] was not available during the initial trial as a result of missteps by the Social Security Administration, not Webster’s counsel.”

**Police search and seizure and qualified immunity in mental health emergencies: 7<sup>th</sup> Circuit reverses district court and dismisses 42 U.S.C. § 1983 claim against police officers for violating plaintiff’s fourth amendment right against unreasonable seizure, finding the officers had qualified immunity**

***Mucha v. Jackson*, 786 F.3d 1064 (7th Cir. 2015).**

Jason Mucha was a Milwaukee police sergeant referred for psychiatric examination after failing to report to duty for 7 months due to stress. In his examination, Mucha admitted to having had thoughts of committing suicide by cop, specifically “going to a command staff meeting with a rifle” and “shooting them until they shoot me.” Mucha stated that he did “not intend[] to do that” but that going back to work “could have a real bad ending.” The psychiatrist, in a report to the police department two weeks later, stated that sending Mucha back to work would be a “public safety issue.” The police sent two officers with Tactical Enforcement Unit backup to Mucha’s home to speak with him. At that time Mucha said he had no intention of harming himself or others, but he did admit to having dreams or thoughts of committing suicide or hurting others. The officers detained Mucha and took him to the Milwaukee County Mental Health Facility where he was admitted after the facility’s treatment director found that Mucha suffered from “adjustment disorder with disturbance of conduct and mood” and so “posed a threat of danger to self or others.” Mucha was released after three days and filed suit for unreasonable seizure and false imprisonment. The District Court for the Eastern District of Wisconsin denied the officers’ motion for judgment on the pleadings with respect to their claims for qualified immunity.

The Seventh Circuit Court of Appeals reversed, holding that the officers were entitled to qualified immunity, as they had not violated “any clearly established law, whether constitutional or statutory, federal or state.” Judge Posner noted that the officers had relied upon Wisconsin’s emergency detention statute, which authorizes police officers to take a person to an appropriate mental health facility if they have “cause to believe” that the person is “mentally ill” and has demonstrated “a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.” The district court had accepted Mucha’s Fourth Amendment argument that the officers did not “have probable cause to believe that he was mentally ill and posed a danger to himself and to other police officers.” The district court noted that the psychiatrist’s information was 15 days old when received, and thus was not “recent” within the meaning of the emergency detention statute. The Seventh Circuit rejected Mucha’s argument, however, noting that the Wisconsin statute does not define “recent” and that the definition can vary depending upon context. Given the nature of Mucha’s statements to the psychiatrist, the Circuit Court held that the statements were still recent or at least not clearly established as no longer recent. Moreover, the Circuit Court noted that “[a] state law cannot preempt the Fourth

Amendment” but it “can establish a standard of conduct that is consistent with the amendment but particularized to a specific situation.” Because the “danger signals” known to the police at the time of their interview with Mucha reasonably triggered the emergency detention statute, “the defendant officers...were complying with a statute the validity of which is not contested.”

**Competence to enter into plea agreement: District court abused its discretion in not *sua sponte* ordering competency evaluation based upon medical evidence of incompetence introduced for the defendant’s sentencing hearing**

***U.S. v. Wingo*, 2015 WL 3698157 (11th Cir. 2015).**

Andrew Wingo was a defendant in a complex securities fraud case, and was represented by counsel. Wingo made only brief appearances before the court, and ultimately entered into a plea agreement in which he pleaded guilty to just one of the numerous charges against him. Some evidence of Wingo’s health concerns came to light during early proceedings (e.g., bond revocation hearing), but neither his attorney nor the government raised any concerns about Wingo’s competence at the plea hearing. The issue of Wingo’s mental capacity was not raised until the sentencing phase approximately six months later, when Wingo’s attorney requested a reduced sentence based upon diagnoses of dementia and other cognitive impairments. The pre-sentence report from the government also noted Wingo’s cognitive impairments. The court at sentencing noted the medical information submitted regarding Wingo’s condition, but determined that this should not affect the length of sentence. Wingo appealed, arguing that the court had both a statutory and a constitutional duty to order a competency hearing *sua sponte* because there was reasonable cause to doubt his competence.

The Eleventh Circuit noted that in a prior case (*Tiller v. Esposito*, 911 F.2d 575, 576 (1990)) it had identified three factors to be considered in determining whether information establishes a “bona fide doubt regarding the defendant's competence.” After a detailed review of the evidence submitted prior to the sentencing hearing, the Eleventh Circuit found that the evidence was sufficient to create “reasonable cause to believe that Wingo was incompetent to proceed to trial or to plead guilty.” It found that the district court had abused its discretion in failing to *sua sponte* order a competency hearing, and remanded the case to the district court to determine “whether Wingo's competency can be evaluated *nunc pro tunc*, and if so, for an assessment of his competency at the time of his guilty plea and sentencing.” The Eleventh Circuit stated that if such evaluation were to find Wingo was incompetent at the time of the plea agreement, or if such evaluation is not possible, Wingo's conviction and sentence must be vacated, with the government having the right to try him if he becomes competent. If the evaluation were to find Wingo was competent, his conviction and sentence must be affirmed.

**Mental illness and mens rea: Right to due process in criminal trial may be violated by state trial court's exclusion of proffered expert testimony that, because of defendant's mental condition, defendant lacked the *mens rea* required under state law to be guilty of the crime charged**

***Roberson v. Stephens*, 2015 WL 3396822 (5th Cir. 2015) (per curiam)** (unpublished opinion).

Robert Roberson was convicted of capital murder in the death of his daughter and sentenced to death. On direct appeal to the Texas Court of Criminal Appeals, Roberson argued *inter alia* that the trial court's exclusion of his expert witness's testimony regarding his organic brain syndrome violated his constitutional right to present a complete defense. Texas law does not recognize diminished capacity as an affirmative defense, but does allow evidence to negate the *mens rea* element of offenses. The Court of Criminal Appeals rejected Roberson's claim, concluding that the doctor's testimony was "not relevant as to Roberson's ability to form the requisite *mens rea* for the offense" but "was merely being used as a mental-health defense not rising to the level of insanity." After his direct appeal, Roberson filed applications for a writ of habeas corpus first in state court and then in the United States District Court for the Eastern District of Texas, but was denied.

The Fifth Circuit, in a *per curiam* opinion, granted a certificate of appealability as to Roberson's due process *mens rea* evidence claim. It noted that "evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" infringe the Constitutional guarantee to "a meaningful opportunity to present a complete defense." Although it granted the certificate of appealability, the Fifth Circuit made it clear that Roberson still bears the burden of persuading the Court that the expert testimony was "substantial enough that its exclusion constituted an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States" as is required by 28 U.S.C. § 2254(d)(1) for habeas relief.

**Sexually violent offenders: Rational basis exists for different standards of review under California law for civilly committed sexually violent offenders and other civilly committed persons, so that such difference does not violate equal protection clause of 14<sup>th</sup> amendment**

***Seeboth v. Allenby*, 2015 WL 3772754 (9th Cir. 2015).**

Cliff Allenby, a sex offender civilly committed under California's Sexually Violent Predator Act ("SVPA"), filed a habeas petition claiming that the absence of a recommitment trial timing provision in the SVPA was a violation of equal protection. Under California law, other civilly committed persons—specifically mentally disordered offenders and those found not guilty by reason of insanity—have a statutory right to a recommitment trial within a defined period of time. The state and district courts denied the petition, holding that sexually violent predators are not "similarly situated" to other

groups of civilly committed offenders for the purpose of an equal protection challenge to the lack of a timing provision in the SVPA.

On appeal, the Ninth Circuit affirmed, concluding that it was neither objectively unreasonable nor contrary to clearly established federal law for the state courts to hold that the lack of a recommitment trial timing provision in the SVPA was not an equal protection violation. The Court held that the use of the rational basis test was reasonable, and that the state legislature had a rational reason to “distinguish between individuals who have been found to be mentally ill and dangerous and individuals who have been found to be mentally ill and *sexually* dangerous” (emphasis in original).

### State Court Decisions

**Competency to waive counsel (Colorado): Colorado’s state-developed process for assessing competency meets constitutional requirements and does not require adoption of process set out by the U.S. Supreme Court in *Indiana v. Edwards***

*People v. Davis*, 2015 CO 36 (Colo. 2015). (This opinion has not been released for publication in the permanent law reports and until it is released, it is subject to revision or withdrawal.)

Rashaim Davis was convicted in a Colorado state court of possession and distribution of a controlled substance and various related charges. Prior to trial, Davis informed the court that he wanted to represent himself. During a pretrial colloquy, Davis told the trial court that he was taking an antidepressant, Wellbutrin, for “bipolarism” and “mental condition as far as...not trusting people,” but that the Wellbutrin did not completely control the paranoia that had led to his mistrust of his court-appointed lawyers. The trial court found that Davis was unable to voluntarily, knowingly, and intelligently waive his right to counsel. The court of appeals reversed the trial court’s order denying Davis’s request to proceed *pro se*, proscribing a new standard for a criminal defendant’s competency to waive the right to trial counsel, relying on the United States Supreme Court’s decision in *Indiana v. Edwards*, 554 U.S. 164 (2008).

The Colorado Supreme Court reversed the court of appeals, holding that Colorado’s “existing two-part, totality-of-the-circumstances analysis to determine whether a defendant has validly waived the right to counsel affords trial courts sufficient discretion to consider a defendant’s mental illness.” The Colorado Supreme Court noted that state law already requires that a waiver of the right to counsel be both “voluntary” and “knowing and intelligent,” and that “mental illness might prevent him from broadly understanding the charges, punishments, defenses, and other essential facts of the case.” Thus, a trial court could “consider the defendant’s mental illness during its totality-of-the-circumstances-analysis.” Additionally, the Colorado Supreme Court held that Colorado law does not require an *Edwards* standard because it already provides “what the Supreme Court sought in *Edwards*: an analytical scheme that appropriately considers whether mental illness should prevent the defendant from representing himself at trial.”

**Insanity defense (Georgia): Notes and reports of mental health experts examining defendant for purposes of assisting defense counsel in regard to possible insanity defense are protected from discovery by the attorney-client privilege, as long as the experts do not testify at trial and the experts who do testify do not use that information**

*Neuman v. State* No. S15A0011, 2015 WL 3658828 (Ga. June 15, 2015).

Hemy Neuman was tried for murder and firearm possession in Georgia state court; he pleaded not guilty and intended to raise the insanity defense. The jury eventually found the defendant guilty but mentally ill, and Neuman appealed on the grounds that the trial court improperly admitted evidence protected by attorney-client privilege. During discovery, the State sought the records of doctors retained by defense counsel as consultants on the issue of Neuman's mental condition. Over Neuman's objection, the trial court admitted the records, including statements Neuman had made during the doctors' evaluations, even though defense counsel had not intended to call the doctors as witnesses at trial.

The Georgia Supreme Court held the doctors' notes, evaluations, and the statements made to them by the defendant were all protected by the attorney-client privilege. It rejected the State's argument that "merely raising an insanity defense waives the attorney-client privilege for these communications." The Court joined "numerous other jurisdictions in holding that the attorney-client privilege applies to confidential communications, related to the matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client's representation." The Court further held that privilege is "not waived if the expert will neither serve as a witness at trial nor provide any basis for the formulation of other experts' trial testimony." The Court did note, however, that if counsel later decided to include the expert or experts as witnesses at trial, "the cloak of privilege ends."

**Involuntary outpatient commitment (Vermont): For continuation of an outpatient treatment order, the statutory and constitutional burden on the state is to prove by clear and convincing evidence that failure to renew the order will result in the person posing a threat of harm to self or others in the near future; evidence of the individual's repeated mental deterioration when off of medications is not sufficient alone**

*In re T.S.S.*, 2015 VT 55 (Vt. Apr. 10, 2015).

Respondent T.S.S., a person diagnosed with paranoid schizophrenia, had been involuntarily committed in 2003 due to severe delusions and extreme lack of self-care. He was released from the hospital in November 2003, but placed under an order of non-hospitalization (ONH) for continued outpatient treatment. That order was renewed annually for a period of years, but was not renewed in 2008. In 2012, T.S.S. was arrested for "unlawful mischief," a misdemeanor, but was found incompetent to stand trial. That charge was dropped when T.S.S. agreed to an ONH that required his continuing

outpatient treatment, including medication. T.S.S. did not contest renewal of that ONH in 2013, but he did object in 2014, and an evidentiary hearing was held.

At the evidentiary hearing, a doctor testified that T.S.S. had “demonstrated a clear pattern that...he, on orders of non-hospitalization, [would] take medications and improve significantly. But when he [was] off the order of non-hospitalization, he quickly [went] off medications and deteriorate[d].” Although the doctor testified that the deterioration was unavoidable—estimating that T.S.S. would deteriorate mentally within one year—he could not predict when T.S.S. would deteriorate to the point of posing a danger of harm to himself or others. The superior court granted the application for a continued ONH.

Vermont law allows continued ONHs for a person whose “capacity to exercise self-control, judgment, or discretion in the conduct of his or her affairs and social relations is so lessened that he or she poses a danger of harm to himself, to herself, or to others” when it is shown “that in the near future his or her condition will deteriorate and he or she will become a person in need of treatment.” *See* 18 Vt. Stat. Ann. §§ 7101(16), (17). The Vermont superior court held that the phrase “near future” referenced “when the condition will deteriorate and not necessarily when the patient will become a person in need of treatment.” Thus, the State need only prove that a defendant’s “condition will deteriorate in the near future and this will inevitably lead to him” needing treatment.

On appeal, T.S.S. argued that the superior court had erred in its interpretation of the statute. The Supreme Court of Vermont agreed, holding that the proper determination was “whether T.S.S. [was] likely to pose a danger to himself [or others] in the near future.” Although it was “undisputed that T.S.S.’s care-providers sought a continued ONH because they...want to protect him from making a choice that would lead him, eventually, to become a danger to himself,” the Court emphasized that “the fact is, people who do not pose an imminent danger to themselves or others have a right to autonomy that includes the right to make decisions about the most personal of matters, even if those decisions are deemed by others to be profoundly ill-advised.” The Court also noted that basing a continued ONH on “a finding that the person is likely to become a person in need of treatment at some point in the future (however distant)” would “present serious constitutional concerns...That a person could or will ‘eventually’ become a person in need of treatment is, standing alone, a thin reed upon which to predicate a continued intrusion upon fundamental liberty.”

Because the “last specific evidence of T.S.S. actually posing a danger to himself” dated back “more than 10 years,” the Court found that the record was not sufficient to conclude that T.S.S. was likely to become a danger to himself or others in the near future.

**Not guilty by reason of insanity commitment: In proceeding by the state to extend NGRI acquittee’s commitment beyond the length of the maximum prison sentence for the originally charged offense(s), the individual facing extended commitment has the right to refuse to testify in the proceeding**

*Hudec v. Superior Court Orange County*, 339 P.3d 998 (Cal. 2015).

Charles Hudec, a person diagnosed with paranoid schizophrenia, was found not guilty by reason of insanity of killing his father and was committed to a state hospital for a period of time reflecting the maximum sentence for voluntary manslaughter. In March 2012, the district attorney petitioned to extend Hudec's commitment pursuant to Cal. Penal Code § 1026.5. That section allows a person's commitment to be extended if, because of mental disorder, he "represents a substantial danger to others." The section also states that a person so tried is "entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." The California Supreme Court noted that, although § 1026.5 does not "expressly grant NGI [sic] extension respondents all the rights of a criminal defendant," the statute "reflects a legislative effort to prescribe procedures fair to both the respondent and the People." The Court found the right to refuse to testify among those afforded because recognition of the right would not result in "any absurd consequence"—such as would ensue were a respondent to attempt to assert the right not to be tried while mentally incompetent.

**Sexually violent offender (Iowa): Iowa's statutory scheme allowing continuing community supervision of offenders who no longer meet the criteria for institutional commitment does not violate the due process clauses of the Iowa or United States Constitutions**

*In re Det. of Matlock*, 860 N.W.2d 898 (Iowa 2015).

Calvin Matlock, a person civilly committed under Iowa's Sexually Violent Predator Act, argued that his supervised release violated the Due Process Clauses of both the Iowa and the United States Constitutions. The Iowa Supreme Court held that an order of supervised release did not violate either state or federal due process so long as the supervisee "continues to suffer from a mental abnormality, the testimony supports the need for supervision, and the supervision strikes the right balance between the need to protect the community and the person's liberty interest." Examining the specific release conditions imposed on Matlock, however, the Court found that "the plan [was] more consistent with a person just paroled from prison or on probation, not a person released from a civil commitment." Of particular concern was the fact that "many of the conditions in the agreement appear[ed] to bear no relationship to Matlock's treatment or the protection of the public." Especially problematic was the fact that the Department of Corrections, which was responsible for supervising Matlock's release, had never supervised a person released from the Civil Commitment Unit for Sexual Offenders, and was supervising Matlock as it would any sex offender released from prison. Ultimately, the Iowa Supreme Court remanded the case back to district court "to review the release conditions and enter the appropriate order consistent with due process."

**Involuntary commitment (Alabama): Hospital mental health professionals have sovereign immunity protection for decision-making regarding discharge of involuntarily committed patients, provided that required procedures regarding such discharge are followed**



***Ex parte Kozlovski*, No. 1140317, 2015 WL 1877656 (Ala. Apr. 24, 2015)** (not yet released for publication).

Jeffrey Brown, a 19-year-old man with a long history of mental illness as well as chronic runaway behaviors and periodic violent outbursts, was involuntarily committed to an Alabama psychiatric hospital after physically attacking his father. After a course of treatment at the hospital, the treatment team, led by Dr. Kozlovski, found Mr. Brown met the criteria for discharge and return to the community, and arranged for his placement in a group home, against the wishes of family members who feared the consequences of his runaway behaviors. Within a day of his admission to the group home, Mr. Brown ran away from the group home. He was found dead three days later, apparently struck and killed by a motor vehicle. Mr. Brown's estate filed a wrongful death action against the hospital and Dr. Kozlovski. After discovery, Dr. Kozlovski filed a motion for summary judgment based on "State agent immunity," but the trial court denied the motion. Following that denial, Dr. Kozlovski appealed to the Supreme Court of Alabama and requested a writ of mandamus requiring the trial court to grant the summary judgment motion.

The Supreme Court of Alabama granted the writ, holding that the psychiatrist was discharging duties imposed by state statute, rules, and regulations, and so was entitled to state agent immunity. The Court also noted that, although the State agent asserting immunity bears the initial burden of demonstration that the plaintiff's claims arise from actions that would normally entitle the agent to immunity, that burden shifts to the plaintiff to show that an exception to state-agent immunity is applicable.

## V. Institute Programs

Please visit the Institute's website at

<http://cacsprd.web.virginia.edu/ILPPP/OREM/TrainingAndSymposia>

The Institute has started announcing its offerings for the program year August 2015 through June 2016. Additional programs will be announced. Please visit and re-visit the Institute's website to see new and updated announcements. The Institute appreciates support for its programs. Please share this edition of *DMHL* and share announcements of programs that may interest your professional, workplace, and community colleagues.

### Of special note:

#### **The Sixteenth P. Browning Hoffman Memorial Lecture in Law and Psychiatry**

**Wednesday, October 7 2015, 4:30 PM**

**at the School of Law, University of Virginia, Charlottesville VA**

**with Jeffrey Swanson, PhD, Duke University**

#### **Firearms, Mental Illness, and the Law: Keeping Guns from Risky People while Keeping Faith with the Second Amendment**

Professor Swanson is Professor in Psychiatry and Behavioral Sciences at Duke University School of Medicine, and holds a PhD in Sociology from Yale University. Professor Swanson received the 2011 Carl Taube Award from the American Public Health Association.

The Lecture will be presented in the Caplin Pavilion of Clay Hall identified as '17A' on this map: <http://www.virginia.edu/webmap/ENorthGrounds.html>

Directions may be found on this map:

[http://www.law.virginia.edu/html/insider/oriented\\_cville.htm](http://www.law.virginia.edu/html/insider/oriented_cville.htm)

'D2' parking lots that are near the Lecture's venue will be available to the public for parking.

The public is welcome & invited to attend. There is no charge. A reception will follow.

**Program webpage with complete information is found at**

<http://cacsprd.web.virginia.edu/ILPPP/OREM/AdultPrograms/Course/83>

## **Other announced programs:**

### **Assessing Risk for Violence in Clinical Practice**

September 11 2015, Charlottesville VA : Topics of this one-day program include overview of risk assessment (history, process, ethical considerations), empirically supported risk factors, structured risk assessment instruments, risk communications and report writing. The HCR:20 instrument is presented including an exercise using a case example. Faculty will also discuss proceeding from risk assessment to risk management. This program meets one of the training requirements for clinicians who conduct VA DBHDS Commissioner evaluations for NGRI acquittees. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$65. Others: \$150. Cancellation fee: \$25

### **Seminar: Schema Therapy for Narcissism**

September 18 2015, Richmond VA : This one-day program covers topics regarding the challenge of treating narcissism, with expert Wendy Behary, LCSW, founder and director of The Cognitive Therapy Center of New Jersey and The New Jersey Institute for Schema Therapy, and distinguished founding fellow and consulting supervisor for The Academy of Cognitive Therapy. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$65. Others: \$150. Cancellation fee: \$25

### **Basic Forensic Evaluation: Principles and Practice**

October 5-9 2015, Charlottesville VA : This five-day program provides foundational, evidence-based training in the principles and practice of forensic evaluation. Content includes clinical, legal, ethical, practical and other aspects of forensic evaluation with adults. The format combines lectures, clinical case material, and practice case examples for evaluation of adults. Day five incorporates a report writing exercise. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$300. Others: \$750. Cancellation fee: \$25

### **Workshop: Motivational Interviewing for Practitioners in Juvenile Justice: An Introduction**

October 30 2015, Charlottesville VA : This one-day program, in a workshop setting with limited attendance, will provide an introduction to theory, principles, and practice of Motivational Interviewing. Karen Ingersoll PhD, with the

University of Virginia School of Medicine, and an international expert on uses of Motivational Interviewing, will be lead faculty. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$65. Others: \$150. Cancellation fee: \$25

### **Seminar: Trauma and Treatment**

November 12 2015, Charlottesville VA : This one-day program, in a seminar setting with limited attendance, will provide an overview of issues of trauma and treatment. Matthew Yoder PhD, with the National Center for PTSD's Consultation Program, and formerly with the Ralph H. Johnson VA Center in Charleston SC, will be lead faculty. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$65. Others: \$150. Cancellation fee: \$25

### **Assessing Risk for Violence with Juveniles**

January 22 2016, Charlottesville VA: This one-day program trains mental health professionals, juvenile and criminal justice professionals, social and juvenile services agencies, educators, and others to apply current research pertaining to risk assessment with juveniles. Along with theoretical foundations the program includes review of legal parameters, impact of online behavior, and student threats. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$65. Others: \$150. Cancellation fee: \$25

### **Juvenile Forensic Evaluation: Principles and Practice**

April 18-22 2016, Charlottesville VA : This five-day program provides foundational, evidence-based training in the principles and practice of forensic evaluation with juveniles. Content includes clinical, legal, ethical, practical and other aspects of forensic evaluation with juveniles. The format combines lectures, clinical case material, and practice case examples for evaluation of juveniles. To be authorized to perform juvenile competence evaluations in Virginia please review Advanced Case Presentation requirements. Registration fees: Employees of VA DBHDS facilities and Community Services Boards/Behavioral Health Authorities: \$300. Others: \$750. Cancellation fee: \$25

### **Evaluation Update: Applying Forensic Skills with Juveniles**

April 18, 19, 20 2016, 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. To be authorized to perform juvenile competence evaluations in Virginia please review Advanced Case Presentation requirements. Registration fees: Employees of VA DBHDS facilities and Community Services Boards: \$150. Others: \$190. Cancellation fee: \$25.

**Advanced Case Presentation: Juvenile Adjudicative Competence**

Spring 2016, 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 of the VA DBHDS Commissioner for individuals authorized to conduct juvenile competence evaluations. [ NOTE: The Date will be determined. ] Registration fee: TBD.

**Programs being planned, to be announced:**

**Mental Health Evaluations for Capital Sentencing Proceedings**

**Assessing Individuals Charged with Sexual Crimes**

Questions about ILPPP programs or about *DMHL*?: please contact [els2e@virginia.edu](mailto:els2e@virginia.edu)

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