

# ***DEVELOPMENTS IN MENTAL HEALTH LAW***

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

**Volume 36, Issue 3**

**Fall 2017**

---

## **In This Issue:**

**I. Article: Holloman v. Markowski: An Opportunity for Further Reflection  
on Police Encounters with People in Mental Health Crisis** [p. 1]

**II. Editor’s Comment: Excessive Force Jurisprudence and Police Encounters  
with People in Mental Health Crisis** [p. 16]

**III. Case Law Developments**  
Federal Circuit Court Decisions [p. 22]  
State Court Decisions [p. 30]

**IV. Institute Programs** [p. 40]

Of Special Note:

A one-day workshop  
The Biopsychosocial Imprint of Complex Trauma: Implications for Evaluation and Treatment  
in Forensic and Community Contexts  
with Katherine Porterfield PhD, New York University  
Thursday January 11 2018

A one-day workshop  
Building Young People’s Resilience  
with Michael Ungar PhD, Dalhousie University (Nova Scotia)  
Tuesday April 24 2018

---

## **I. Article**

**HOLLOMAN V. MARKOWSKI**  
“An Opportunity for Further Reflection  
On Police Encounters with People in Mental Health Crisis”

Stephen L. Braga  
Professor of Law  
University of Virginia School of Law

This past court term, the United States Court of Appeals for the Fourth Circuit decided the case of *Holloman v. Markowski*, No. 15-1878 (4th Cir. Oct. 7, 2016). Four years earlier, Marcella Holloman’s mentally ill son Maurice Johnson (“Johnson”) was shot to death by two officers of the Baltimore Police Department (“BPD”). Holloman sued the officers for violation of her son’s civil rights. The Fourth Circuit found that the officers were entitled to qualified immunity from being sued for shooting—and killing—Johnson.

As the old adage advises, “hard cases make bad law.” It is difficult to imagine a harder set of facts than those confronted by the Court in *Holloman*.<sup>1</sup> Less than a minute after encountering two fully armed white Baltimore police officers, the unarmed, mentally ill, African-American Johnson was dead. While the extreme nature of these facts might help to explain the unsatisfying nature of the Court’s result, it also provides a ready vehicle for reexamining certain aspects of the way such encounters might be handled as well as the way failed encounters might be litigated. Clearer guideposts would be a good thing for everyone. Society, the members of society who live with mental illness, and the law enforcement community all deserve better.

## FACTS

At the time of his death, then thirty-one year-old Johnson lived with Holloman in their shared residence located at 3531 Elmora Avenue in Baltimore City, Maryland. J.A. at 26.<sup>2</sup> Johnson was a professional cook and was working toward obtaining his G.E.D. J.A. at 270-272. In 2009, the University of Maryland Hospital diagnosed Johnson with manic-depressive disorder and this diagnosis was entered in the Maryland State database, an official state record of persons known to suffer from mental disorders. J.A. at 25. Johnson received medical treatment for this disorder. *Id.*

### Johnson Comes Home Upset

On May 19, 2012, at approximately 5:00 p.m., Johnson arrived home and walked into the backyard where Holloman was hosting her granddaughter’s sixth birthday party. J.A. at 26, 274. Holloman noticed that Johnson appeared “visibly upset.” J.A. at 26. However, she “did not . . . know the reason why.” J.A. at 26.

### Johnson Goes Upstairs To His Room And Breaks Things

Johnson then went upstairs into his room where he broke his large mirror and the television on his nightstand. J.A. at 267. Holloman heard a “splash” sound coming from inside and went upstairs to check on Johnson. *Id.* Upon seeing Johnson’s broken

---

<sup>1</sup> The factual difficulties in the case were compounded by the fact that Holloman was proceeding *pro se* in the district court.

<sup>2</sup> J.A. citations are to the “Joint Appendix” filed in the United States Court of Appeals for the Fourth Circuit.

possessions, Holloman knew that Johnson was experiencing a mental health episode and that he needed “some medicine.” *Id.* She told Johnson that she would take him to the hospital once the party was over. *Id.* Johnson responded by telling Holloman that she should call the police because he “ain’t going nowhere.” *Id.* Holloman told Johnson that police involvement was unnecessary. *Id.* She then returned downstairs while Johnson remained in his room. *Id.*

Holloman’s daughter, Barbara, subsequently went upstairs to speak with Johnson. *Id.* She asked him why he was “zapping out” and “busting up [his] stuff like that.” J.A. at 275. Barbara and Johnson “had some words,” and their verbal argument turned into “some tussling.” *Id.* Shortly after, Barbara returned downstairs completely uninjured. J.A. at 276.

#### Johnson Comes Downstairs And Continues To Act Up

After Holloman asked the party-attendees to leave, Johnson came downstairs and tried to dislodge the screen door from the back door. J.A. at 275. Next, he pushed his foam mattress onto the front lawn where he pulled it apart into tiny pieces. J.A. at 277-278. While Johnson was preoccupied on the front lawn, Barbara locked the front door of the house to keep him outside. J.A. at 278.

Once Johnson found himself locked out of the house, he started kicking the front door to get inside. J.A. at 279. Johnson then proceeded around the house, through the alley and up to the back door. *Id.* Holloman locked the back door from inside though just as Johnson was reaching for its handle. J.A. at 280. Finding the back door locked too, Johnson started kicking at it to get inside. *Id.* At this time, Johnson was completely locked out of the house. *Id.*

#### Holloman Calls 911 To Take Johnson To The Hospital

At 5:05 p.m., Holloman called 9-1-1 to ask the BPD and/or the Baltimore Fire Department to assist her in transporting Johnson to the hospital for medical care. J.A. at 26. They had successfully helped transport Johnson to the hospital before, and Holloman trusted that they would do so again. J.A. at 271. At the time, Officers Markowski and Bragg were separately on duty working as uniformed police officers for the BPD. J.A. at 26. Both officers were apprised of Ms. Holloman’s 9-1-1 call. *Id.*

#### Two BPD Officers Respond To The 911 Call

At 5:17 p.m., Markowski arrived at 3531 Elmora Avenue. *Id.* He was “well aware of [Johnson’s] disorder” from previous interactions and from “his knowledge of [Johnson’s] name being contained in the [Maryland State] database.” J.A. at 25. Holloman unlocked the front door to let him in. J.A. at 27. She then informed Markowski that Johnson was “o.k.” in the backyard, but she asked Markowski to wait for another responding officer to arrive before addressing Johnson’s situation. *Id.* Markowski paid “no mind” to Holloman’s suggestion however, and he instead marched

right through Holloman's living room, dining room and kitchen to the back door. *Id.* Markowski then called out Johnson's name, which prompted Johnson to stop kicking on the door and to start knocking instead. *Id.*

As Johnson was knocking on the back door, Holloman explained to Markowski that Johnson was suffering from a mental health episode, that Johnson had "psych issues," that he had "zapped out" and that he "wasn't going to stop." J.A. at 280. That was why she wanted police help in transporting him to the hospital for treatment. A few seconds later, Bragg arrived at the scene and joined Markowski and Holloman at the rear of the house. J.A. at 27.

At this point in time, a locked, steel door stood between the two fully armed police officers inside the house and the unarmed Johnson outside. J.A. at 280.

#### Holloman Tells The Officers To Use Their Tasers Not Their Guns

While BPD Officers Markowski and Bragg calculated their next move, Holloman told both officers: "Don't sho[o]t him but just taze him 'cause I do know tazing make him stop." *Id.* Nonetheless, Bragg then unbuckled the safety strap on his leather gun holster, causing Holloman to implore him "not to shoot [her] son." *Id.* As Holloman's last plea left her lips, Bragg opened the back door. *Id.*

Johnson then stepped inside the now-open door and everybody surrounded him, screaming at him to "calm down." J.A. at 281. Both officers "could clearly see that [Johnson] was unarmed," J.A. at 28, and Johnson did not make any aggressive gestures or sudden movements toward the officers. *Id.*

#### Officer Markowski Initiates A Struggle With Johnson

Markowski then quickly seized Johnson's left arm with both hands while Bragg simultaneously grabbed Johnson's right arm in a similar fashion. *Id.* Johnson resisted their seizure, and the tangled group of men bulldozed their way into the dining room. J.A. at 281. Johnson soon escaped the officer's restraint and "punched" one of the officers. *Id.* Johnson and Markowski then fell to the ground in a struggle. *Id.* While on the ground, Johnson maneuvered his way on top of Markowski while "the other officer [got] on top of [Johnson]," trying to pull Johnson off. *Id.* Sandwiched between the two officers, Johnson tried to fend off Bragg by throwing his hands back. J.A. at 268.

#### Both Officers Shoot Johnson At Close Range And Kill Him

Markowski suddenly reached behind his back and pulled out his gun. J.A. at 28. He pressed its barrel against Johnson's chest and squeezed its trigger twice. *Id.* Bragg then drew his gun and fired it into Johnson's back. Johnson fell forward, gasping for his last breath. *Id.* At approximately 5:18 p.m., Johnson died from the multiple gun wounds to his chest and back. *Id.* The time interval between the beginning of the BPD Officers' encounter with Johnson and Johnson's death was approximately one minute. *Id.*

## Holloman Files And Loses A Civil Rights Lawsuit Over Her Son's Death

On May 8, 2014, Holloman “filed a pro se civil rights action in the United States District Court for the District of Maryland (“District Court”) on behalf of her deceased son” under 42 U.S.C. §1983. J.A. at 22. On February 19, 2015, Markowski and Bragg moved for summary judgment on Holloman’s “excessive force” claim against them. J.A. at 253. Holloman filed a response on February 26, 2015 and a motion to appoint much-needed counsel on April 15. J.A. at 289, 300. The request for appointment of counsel was subsequently denied. On July 22, 2015, the district court issued a memorandum opinion granting Markowski’s and Bragg’s motion for summary judgment. J.A. 335-345.

The district court began its analysis of the police officers’ summary judgment motion with the following recognition of the limitations on its review:

The record here is relatively sparse. The only substantive material Officers Markowski and Bragg provide to support their motion is a transcript of the recorded statement Holloman provided to detectives soon after the shooting. Because they wish to avoid a protracted discovery dispute, Officers Markowski and Bragg rely primarily on the facts in Holloman’s amended complaint and the recorded statement. Holloman submits no materials with her opposition. The court relies on her recorded statement when possible but otherwise cites to her amended complaint.

J.A. at 335, n.2. Indeed, Officers Markowski and Bragg never made a single factual averment of their own to explain and support their conduct in shooting Holloman’s son to death, both choosing instead to “answer” her amended complaint by simply generally denying its allegations. J.A. at 216-217 & 219-220. And contrary to the regular practice in qualified immunity cases nationwide, the officers strategically declined to submit affidavits in support of the objective reasonableness of their actions in the circumstances they confronted.

On the basis of the limited paper record before it, the district court then went on to find that the officers had not used excessive force in their encounter with Johnson. As a result of this finding, the district court never addressed the officers’ claim that even if they had used excessive force, they were entitled to qualified immunity from suit for doing so.

### Holloman Appeals To The Fourth Circuit

Holloman appealed the district court’s decision in the BPD officers’ favor to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit subsequently appointed counsel to represent Holloman. In briefing the appeal for that Court, Holloman argued *inter alia* that: 1) the *Graham v. Conner* factors<sup>3</sup> indicated that the officers use of

---

<sup>3</sup> See *Graham v. Conner*, 490 U.S. 386, 396 (1989).

lethal force against Mr. Johnson was not objectively reasonable;<sup>4</sup> 2) “[s]hooting Mr. Johnson was not a proportional use of force under the circumstances” because no “non-lethal weapons were employed or warnings given” before the fatal shots were fired;<sup>5</sup> and 3) that “even if the first shot fired at Mr. Johnson might somehow have been justified, that justification does not automatically attach to the subsequent shots [and] the district court failed to account for this important effect of the different shots fired by the different officers.”<sup>6</sup> Holloman also complained that “the most disturbing factor in the district court’s decision to grant summary judgment to the two BPD officers who shot Ms. Holloman’s son is the almost completely barren factual record which formed the backdrop for that ruling.”<sup>7</sup>

### An Intervening Development

After the briefing of Holloman’s appeal was completed, but before the oral argument of that appeal, the United States Department of Justice issued the long-awaited report on its fourteen-month investigation of the BPD in light of “the death of Freddie Gray and ensuing unrest” in the city. See <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> (“BPD Rpt.”). The report could not have been more scathing in its condemnation of the BPD’s “pattern or practice” of using “constitutionally excessive force” in its encounters with citizens. BPD Rpt. at 8. The first two “recurring issues” in this regard noted in the report were as follows:

First, BPD uses overly aggressive tactics that unnecessarily escalate encounters, increase tensions, and lead to unnecessary force, and fails to de-escalate encounters when it would be reasonable to do so. Officers frequently resort to physical force when a subject does not immediately respond to verbal commands, even where the subject poses no imminent threat to the officer or others. These tactics result from BPD’s training and guidance.

Second, BPD uses excessive force against individuals with mental health disabilities or in crisis. Due to a lack of training and improper tactics, BPD officers end up in unnecessarily violent confrontations with these vulnerable individuals. BPD provides less effective services to people with mental illness and intellectual disabilities by failing to account for these disabilities in officers’ law enforcement actions, leading to unnecessary and excessive force being used against them. BPD has failed to make reasonable modifications in its policies, practices and procedures to avoid discriminating against people with mental illness and intellectual disabilities. *Id.*

---

<sup>4</sup> Opening Brief of Appellant at 17-23.

<sup>5</sup> Opening Brief of Appellant at 23-24.

<sup>6</sup> Opening Brief of Appellant at 25.

<sup>7</sup> Reply Brief of Appellant at 10.

Johnson's shooting occurred right in the middle of the time period investigated by the DOJ. And one of the examples of questionable police conduct detailed in the DOJ Report chillingly echoed Johnson's experience:

Tragically, some encounters with people with mental health disabilities or in crisis have resulted in uses of deadly force that may have been avoided had officers used tactics to account for the mental state of the individuals involved. For example, in a 2012 incident, a single officer was the first to arrive on the scene in response to a call by a man, Zachary, who informed the dispatcher that he had "a weapon" and was "about to do something crazy." After the officer was dispatched, another officer and sergeant stated over the air that they would respond as backup. The officer did not wait for backup to arrive, however, or request the presence of a specially trained crisis intervention officer, despite the fact that he had prior information that Zachary had a weapon and was in crisis. The officer also made no attempt to contact Zachary inside the house before approaching the door, or consider less-lethal options for intervention. Instead, the officer went up to the door, alone, and with his gun already drawn. When Zachary opened the door with a lit cigarette in one hand, and a knife in the other, the officer reportedly ordered the man three times to drop the knife, and when he did not comply, the officer fired, killing him. After radioing dispatch to inform that he had arrived on the scene, less than two minutes passed before he announced that Zachary had been shot two to three times.

BPD Rpt. at 84.<sup>8</sup> The DOJ Report concluded that such incidents were the "result [of the fact] that BPD officers frequently fail to de-escalate encounters with unarmed individuals with mental health disabilities and those in crisis. Indeed, their tactics often escalate these encounters. Instead of requesting an officer trained in handling crisis events or a mobile crisis team made up of trained mental health professionals, officers handcuff and detain people with mental health disabilities and those in crisis and resort too quickly to force without understanding or accounting for the person's disability or crisis." *Id.* at 80.

#### Oral Argument Of Holloman's Appeal

On September 20th, the Fourth Circuit heard oral argument of Holloman's appeal. During the course of argument, Judge Harris asked counsel for Markowski and Bragg the completely understandable question why the officers had not submitted any affidavits describing their view of the circumstances surrounding their fatal encounter with Johnson? As Judge Harris put it, this "case is so much harder than it has to be because

---

<sup>8</sup> Unfortunately, Zachary's heartbreaking story was not an isolated incident. The DOJ Report recounted many examples in support of its findings, including detailed stories about interactions with police by mentally ill citizens Christopher, James and David as well. *Id.* at 81-83. It was the DOJ's belief that "[u]sing effective de-escalation techniques and calling for assistance from a mental health provider or officer trained in crisis intervention techniques would have likely prevented the use of force against all of these individuals."

we don't have affidavits.”<sup>9</sup> Judge Motz later chimed in to similar effect saying: “it is strange they didn't put affidavits in.” Counsel's response to this question, and these concerns, was that trial counsel for Markowski and Bragg did not want to open “protracted discovery disputes” by submitting such affidavits. In rebuttal, Holloman's counsel asked—as Holloman had also done in her briefs on appeal—for the case to be remanded to the district court for further development of the critical facts and circumstances missing from the record.

Shortly after argument, the Fourth Circuit ruled against Holloman. As relevant herein, that Court found that BPD Officers Markowski and Bragg were entitled to qualified immunity from being sued for shooting to death the unarmed and mentally disabled Johnson. The Fourth Circuit explained this qualified immunity ruling as follows:

“A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Carroll v. Carmon*, 135 S. Ct. 348, 350 (2014). A plaintiff seeking to avoid an officer's qualified immunity defense must demonstrate both that (1) “the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a federal right,” and (2) this “right was clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional.” *Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015).

We exercise our discretion to begin with the second question--whether the asserted right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). “The dispositive question is whether the violative nature of particular conduct is clearly established . . . in light of the specific context of the case...” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal citations and quotations omitted). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Thus, here we must determine whether, as of May 19, 2012, relevant precedent established that an officer's use of lethal force is objectively unreasonable and therefore constitutionally excessive when used against an unarmed but physically resistant suspect, who has destroyed property, attacked an officer, and given no indication that he will yield. There is no such precedent. Holloman conceded at oral argument that no case “anywhere” addresses similar facts. The relevant precedent most helpful for her, *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002), contains too many material distinctions to clearly establish that the officers acted

---

<sup>9</sup> The audio recording of the oral argument below is maintained for review on the Fourth Circuit's website.



unconstitutionally in the case at hand. In *Clem*, we denied summary judgment to an officer who allegedly “shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone.” *Id.* at 552. Officers Markowski and Bragg faced markedly different circumstances.

Unlike *Clem*, Johnson engaged in a physical altercation with the two officers. Moreover, Holloman, Johnson’s mother, had told the officers that Johnson had destroyed substantial property that evening and that he likely would not stop; no one told the officers similar facts about *Clem*. Furthermore, despite having no weapon, Johnson had already dragged Officer Markowski to the ground, held him down, fought with him, and fended off Officer Bragg’s effort to pull him away. Again, *Clem* engaged in no similar activity.

In sum, regrettable as Johnson’s death is, under these circumstances neither *Clem* nor any other precedent established that the officers employed constitutionally excessive force.

Slip op. at 7 - 10. In light of its ruling on the qualified immunity issue, the court of appeals had no need to decide the excessive force issue and it accordingly declined to do so.

The Supreme Court subsequently denied Holloman’s petition for a writ of *certiorari*.

#### “FOOD FOR THOUGHT” FROM HOLLOWAN

The daily news regularly makes clear that there is an epidemic of fatal shootings by police in this country.<sup>10</sup> In the face of this epidemic, commentators have noted a trend toward expansion in qualified immunity jurisprudence.<sup>11</sup> This expansion has been a subject of intense national debate as the violence between police officers and individual citizens rages on the street.<sup>12</sup> *Holloman* represents an expansion of the procedural aspects

---

<sup>10</sup> *See, e.g.*, “Fatal shootings by police remain relatively unchanged over the past two years,” p. A1 The Washington Post (Dec. 31, 2016)(“Despite ongoing national scrutiny of police tactics, the number of fatal shootings by officers in 2016 remained virtually unchanged from last year when nearly 1,000 people were killed by police. Through Thursday, law enforcement officers fatally shot 957 people in 2016 - close to three each day . . . . As was the case in 2015, a disproportionate number of those killed this year were black, and about a quarter involved someone who had a mental illness.”)(emphases added).

<sup>11</sup> *See* Kinports, “The Supreme Court’s Quiet Expansion Of Qualified Immunity,” Minnesota Law Review, Vol. 100 p. 62 (2016).

<sup>12</sup> *Compare* Bernick, “To Hold Police Accountable, Don’t Give Them Immunity,” The Freeman (2015) and “Fight Police Misconduct? Reform Qualified Immunity,” Above The Law (2015) with MacDonald, “The War On Cops,” Amazon (2016) and Sowell, “The Race War No One Can Win,” National Review (2016). *See generally* “The Problem With Modern Policing, As Seen From The Right And The Left,” New York Times (2016).

of the qualified immunity defense, and it also frames some issues about substantive aspects of the doctrine in the excessive force context as well. Against this backdrop, a few modest proposals for reform come to mind.

Procedure: Through clever defense lawyering against a *pro se* plaintiff, BPD Officers Markowski and Bragg were able to assert a qualified immunity defense without submitting a single factual averment of their own to explain the ‘facts and circumstances’ surrounding Johnson’s shooting as they saw them. Instead, both officers chose to “answer” Holloman’s amended complaint by simply generally denying its allegations. J.A. 216-217 & 219-220. And contrary to the regular practice in qualified immunity cases nationwide, the officers strategically declined to submit affidavits in support of the objective reasonableness of their actions in the circumstances they confronted.

This was unusual in the experience of Circuit Judges Motz and Harris. It was unprecedented in the experience of Holloman’s counsel as well, who asked for a remand to develop those ‘facts and circumstances.’ *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640-641 (1987)(noting that the qualified immunity inquiry “will often require examination of the information possessed by the searching officials” and “the circumstances with which [the officer] was confronted.”). But the Fourth Circuit declined that invitation. As a result, the police officers received qualified immunity for their actions without ever having to explain why they did what they did.

In the midst of the current epidemic of police shootings in this country, there are many societal reasons why we should want to require police officers to have to explain the reasons for their actions in such circumstances. Seeing such police-citizen encounters through the eyes of the officers helps to provide a helpful transparency into the underlying events, much like dashboard camera videos have been doing recently.<sup>13</sup> And such transparency can help to quell the doubters about what really happened, to inform the determination of why it happened and (hopefully) to help prevent it from happening again. As Justice Brandeis famously observed: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”<sup>14</sup>

Here, after years of litigation, Holloman has no idea why Officers Markowski and Bragg decided to take the reckless course of action they did with Johnson. Admittedly, part of her difficulty in getting such an explanation was caused by the fact that she was representing herself *pro se* against skilled defense counsel. Presumably, effective plaintiff’s counsel will be able to secure such police officer explanations in most cases. *See Anderson v. Creighton*, 483 U.S. at 641 (“The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established

---

<sup>13</sup> *See* “Officers, turn on your body cams,” [The Washington Post](#), p. A20 (July 23, 2107)(“evidence suggests that body cameras can serve an important purpose, facilitating accountability and transparency . . . [t]hey can . . . help rebuild trust between law enforcement and communities”).

<sup>14</sup> [Other People’s Money - and How Bankers Use It](#) (1914).

law and the information the searching officers possessed”(emphasis added). But the courts should also provide additional protection in this regard for the rights of the many *pro se* litigants who will continue to appear before them in civil rights cases.<sup>15</sup> Transparency should be its own societal end in this context, regardless of individual litigants’ skill or strategy.

Substance: In searching for “clearly established” law in *Holloman*, the Fourth Circuit cited “the relevant precedent most helpful . . . as *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002),” but then quickly recognized that it “contains too many material distinctions to clearly establish that the officers acted unconstitutionally in the case at hand.” Slip op. at 7. The fact patterns in these cases are always going to be one-off and *sui generis*, however. See *Scott v. Harris*, 550 U.S. 372, 380 (2007)(referring to “the factbound morass of reasonableness” in excessive force cases). Like snowflakes, no two of these cases are ever going to be exactly alike. As a result, some broader principles should be considered to guide the way forward.

Mental Illness: Before *Holloman*, one of the broader principles that seemed firmly ensconced for consideration in the Fourth Circuit’s excessive force jurisprudence was whether the citizen in question was “mentally ill.” *Estate of Armstrong*, 810 F.3d at 900. As the court of appeals clearly delineated in that decision, less than two years ago:

Armstrong’s mental health was thus one of the ‘facts and circumstances’ that ‘a reasonable officer on the scene’ would ascertain. And it is a fact that officers must account for when deciding when and how to use force. ‘The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense.’ ‘The use of force that may be justified by’ the government’s interest in seizing a mentally ill person, therefore, ‘differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.’

Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But ‘in some circumstances at least,’ it means that increasing the use of force may . . . exacerbate the situation.’ Accordingly, ‘the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.’ And even when this ideal course is not feasible, officers who encounter an unarmed and minimally

---

<sup>15</sup> This would not require the Court to enter an adverse final judgment on the merits against any officer who failed to so explain all of the circumstances surrounding his or her actions. Instead, a record lacking such an explanation would simply be found insufficient to support the officer’s affirmative defense of qualified immunity.

threatening individual who is ‘exhibit[ing] conspicuous signs that he [i]s mentally unstable’ must de-escalate the situation and adjust the application of force downward.’

*Id.* at 900 (internal citations omitted, emphasis added).

The fact pattern in *Holloman* presented a paradigmatic situation for application of the de-escalation approach with the aid of trained mental health counselors. The critical point was when Officers Markowski and Bragg had a locked steel door between them and Johnson, and the officers were in complete control of the situation. At that point, they could have chosen to do anything—and to ask for any assistance they wanted—in their approach to Johnson.

It is difficult to imagine how the police officers so completely and so quickly lost control of the situation thereafter. Indeed, these circumstances present a fact pattern of almost *res ipsa loquitor* implications. The facts speak for themselves that something went horribly wrong here from the point of complete police control, including Holloman’s advice that her son had been effectively tasered in the past, to the point of her unarmed, mentally ill son’s killing a moment later.

Why did these BPD officers choose the disastrous course of action they did to open the door and escalate the situation by trying to grab Johnson’s arms to restrain him, leading to the fatal melee? We have no idea from the record in the case because the officers never explained the basis for their actions. But we do have an extrajudicial source of information that helps to answer this question: the DOJ’s BPD Report.

The DOJ report reveals repeated concerns, premised on real world examples during the very time period Johnson was shot, that the BPD actually taught its officers to aggressively escalate situations like this. (None of this is recounted to damn Baltimore individually, but rather to learn from its history experientially. Right or wrong, “Baltimore is at the epicenter of the national debate over police violence,”<sup>16</sup> which logically puts *Holloman* at the center of that debate as well.)

This is not, therefore, a question of 20/20 hindsight second-guessing a potentially mistaken judgment made by officers reacting to unanticipated events in the field.<sup>17</sup> This was apparently a trained judgment to bypass the use of mental health counselors and de-escalation tactics. Yet as both the *Armstrong* Court and the DOJ recognize, the use of both is essential to reasonable—and accommodative—treatment of individuals with a mental illness in their encounters with police officers.

---

<sup>16</sup> Beirich, “Neo-Nazi defended Baltimore in racially charged lawsuits,” p. 11, [Hate and Extremism in 2016](#) (Southern Poverty Law Center).

<sup>17</sup> See *Saucier v. Katz*, 533 U.S. 194 (2001)(cautioning against liability for mistaken beliefs on the ‘hazy border between excessive and acceptable force’).

In light of the BPD settlement agreement with the DOJ referenced as part of the BPD Report, going forward, BPD police officers will be trained and required to use such mental health counselors and/or de-escalation techniques when possible in their interactions with individuals who have a mental illness.<sup>18</sup> Going forward as well, in light of that settlement agreement and the *Armstrong* Court’s findings to the same effect, the obligation for police officers to use those counselors and techniques should be treated as “clearly established” as a matter of law. Thereafter, any officer who intentionally bypasses those obligations without adequate justification would be violating clearly established law in doing so.<sup>19</sup>

Proportionality: In the Fourth Circuit, the author of this article argued strenuously that there was no case precedent anywhere supporting police officers’ use of lethal force against a citizen whom they knew to be unarmed. In response to a question by Judge Harris, opposing counsel agreed that his research had failed to identify any such precedent as well. One can easily understand the absence of such precedent. If the use of force by police officers is supposed to be “proportional” to the force confronted by those officers,<sup>20</sup> then nonlethal force should never be allowed to be met with lethal force because the two forces are (by definition) non-proportional.

Put another way, safety from a punch is not the same thing as safety from a point-blank pistol shot. After Officers Markowski and Bragg tried to physically restrain him, the unarmed Johnson regrettably punched and struggled with Officer Markowski. Was that sufficient justification for two officers to fire three gunshots to his heart to stop the struggle? This not a question of bringing “a gun to a knife fight” where different applications of potentially lethal force might be viewed as proportional to one another. This is an instance of bringing “two guns to a fist fight,” which seems obviously non-proportional.

But what appears “obvious” to one may not appear the same to another. While Holloman’s counsel read the absence of case precedent as proof that the use of lethal force against a nonlethal threat had never been authorized, Judge Harris read the same precedent as proof that such use of force had never been proscribed. Flip sides of the same coin, leading to dramatically different results.

---

<sup>18</sup> The City of Baltimore’s settlement agreement with the DOJ included, among other things, that: “BPD will also ensure that its policies and training conform with legal and constitutional standards for law enforcement interactions with individuals with disabilities, individuals in behavioral health crisis, and juveniles. BPD will seek to partner with community organizations to explore practices to lower the number of incidents involving force, and the amount of force, used against persons with disabilities and in behavioral health crisis. BPD will expand its behavioral health crisis intervention program and seek to work with disability organizations and mental health care providers.” Agreement In Principle at 4.

<sup>19</sup> And establishing “adequate justification,” of course, would require the officer’s explanation for why such a choice was made in light of the “facts and circumstances” being confronted at the time.

<sup>20</sup> *Estate of Armstrong ex rel Armstrong v. Village of Pinehurst*, 810 F.3d 892, 899 (4th Cir. 2016)(requiring “proportionality of the force in light of all the circumstances”). Neither the district court nor the court of appeals ever mentioned the term “proportionality” in their rulings. Slip op. at 7-10; JA 339-343.

Because the Fourth Circuit did not rule upon the “excessive force” issue on appeal, the Court never addressed the “proportionality” of the force used in this context.<sup>21</sup> The court of appeals had the clear discretion to bypass the issue in this regard, but addressing such a fundamental question head-on would have provided clearer future guidance for police officers on whether lethal force may be used in response to an attack—or threatened attack—with non-lethal force.<sup>22</sup> It would also have eliminated the unsatisfying “absence of precedent” consideration, one way or the other, from future qualified immunity determinations on this issue. There is no need for more than one “free bite at the apple.”

There is, however, another potential way to look at this issue through the qualified immunity window. If the law definitively proscribes the non-proportional use of force by police officers in response to a citizen encounter, then perhaps that principle alone should be viewed as the “clearly established” law required to eliminate a qualified immunity defense for the officers involved. For example, suppose an unarmed government protester shouts a racial epithet at a police officer standing in a barricade line, then spits on the officer and raises his arm to punch the officer. Is the officer allowed to shoot that protester dead in response to such provocation? Of course not (although other physical and nonphysical responses would be permitted). The legal principle against such a non-proportional response could—and should—certainly be seen as “clearly established,”<sup>23</sup> which would then allow a more fulsome examination of the police-citizen encounter in litigation unhampered by the qualified immunity defense.<sup>24</sup>

---

<sup>21</sup> As a result, no binding precedent on the “proportionality” of lethal and non-lethal force results from the *Holloman* panel’s decision. Nonetheless, the district court’s decision remains outstanding with its *sub silentio* result to that effect. Because that aspect of the district court’s decision was not affirmed by the Fourth Circuit, however, its persuasiveness as authority is questionable. After all, if the Fourth Circuit believed that the “excessive force” decision by the district court was an “easy” affirmance, then the court of appeals would presumably have exercised its discretion to decide that “easy” issue first. But it did not do so. In addition, the truly persuasive precedents in this area of the law are “the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.” *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998)(*en banc*).

<sup>22</sup> “If the law’s lack of clarity would support an immunity defense, the court can readily dispose of the case after reaching that conclusion. But such a disposition leaves the law unsettled; it fails to give future officials and the individuals with whom they deal a clear idea about what the law permits and forbids.<sup>10</sup> In other words, dispositions based on the law’s lack of clarity serve the interest in minimalist decision-making and constitutional avoidance, but do little to clarify the law.” Pfander, Resolving The Qualified Immunity Dilemma: Constitutional Tort Claims For Nominal Damages, Northwestern University School of Law Scholarly Commons, Faculty Working Papers, Paper 13 (2011). See John C. Jeffries, Jr., Reversing The Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115

<sup>23</sup> Of course, the courts have been cautioned against searching for “clearly established” law at too high a level of generality. But there is a difference between broad but fuzzy general platitudes and broad but specific proscriptions in this regard. The principle against a non-proportional response to force falls into the latter, enforceable category in this author’s view.

<sup>24</sup> None of the positions argued for in the text of this article necessarily lead to final judgment on the merits of any excessive force claim against a law enforcement officer. Instead, they propose changes designed to lead to better reasoned and litigated claims, where all of the relevant facts and circumstances are explored and considered.

## CONCLUSION

There is no denying that police officer-citizen encounters are fraught with potential danger, for both sides. Federal courts have endeavored to balance these competing concerns by developing the doctrine of qualified immunity to provide a buffer against suit for officers who act “reasonably” in the face of such danger. But that immunity was never meant to apply to “obviously” unreasonable conduct by such officers against citizens. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

There is also no denying that police officer encounters with individuals who have a mental illness present special circumstances. The Congress has endeavored to accommodate these circumstances by requiring police departments to comply with the Americans with Disabilities Act in their encounters with such individuals. As the DOJ put it, “[t]raining BPD officers on how to interact with individuals with mental health disabilities is a reasonable modification to policies, practices, and procedures to afford people with mental health disabilities the equal opportunity for a police intervention that is free from unreasonable force. Among other things, such training should result in officers employing appropriate de-escalation techniques or involving mental health professionals or specially trained crisis intervention officers.”<sup>25</sup>

*Holloman v. Markowski* perfectly frames the escalation/de-escalation counterpoints. With a locked steel door between them and the unarmed Johnson, BPD Officers Markowski and Bragg had complete control of this citizen encounter as they decided how to handle it. For unknown reasons, they bypassed de-escalation techniques with a mental health specialist and chose an aggressive escalation tactic of attempting to physically restrain Johnson instead. When the physical restraint failed and angered Johnson, the resulting struggle turned fatal. In a single minute, Johnson was dead, amply illustrating the horrific consequences that can attend the wrong choice about how to handle such police encounters with individuals who have a mental illness.

When all is said and done, the heartbreaking facts of *Holloman* make the case more eloquently than any words can that more consequence should be attached to the initial police decision on whether to proceed with an escalation or a de-escalation approach to a citizen encounter. When the person being encountered has a mental illness, and in particular when it is clear that the person is experiencing a mental health crisis, the choice of de-escalation—preferably with the aid of a mental health counselor—is plainly the preferred alternative. Johnson would likely still be alive today if the BPD officers in his case had exercised that preferred choice. Governments and courts should now set about

---

<sup>25</sup> In support of this conclusion, the DOJ Report cited *Estate of Saylor v. Regal Cinemas, Inc.*, 54 F. Supp. 3d 409, 424 (D. Md. 2014) (holding that the failure to provide appropriate training for officers to interact with individuals with developmental disabilities, which resulted in the death of a 26-year-old man with Down Syndrome after officers attempted to force him to leave a movie theater, properly stated a claim under Title II of the ADA).

enforcing, and reinforcing, the critical importance of that choice with the loss of qualified immunity if it is ignored.

The first opportunity to avoid conflict is always the best one.

## **II. Editor's Comment**

### Excessive Force Jurisprudence and Police Encounters with People in Mental Health Crisis

As Prof. Braga notes in his article, during the appeal of the *Holloman* case to the Fourth Circuit, the U.S. Department of Justice (DOJ) released its findings from its months-long investigation (prompted by the death of Freddie Gray while in the custody of Baltimore police) into the use-of-force policies, training and incidents in the Baltimore Police Department (BPD). The DOJ found a “pattern or practice” in the BPD of using “constitutionally excessive force,” including the inappropriate escalation of encounters with persons with mental disabilities or in mental health crisis that resulted in officers shooting several of those individuals. The DOJ recommended a number of reforms in BPD policies, training and practices on the use of force, which were accepted by the City. The DOJ action, and the potential for wider reform that it represented, were significant. However, the future of such reform appears complicated, due in part to recent changes in DOJ policy, and in part to a reluctance by much of the federal judiciary to provide more definitive standards for police conduct.

#### The DOJ and Developments in Law Enforcement Agencies

As reported in a recent article in the New York Times (Eder, Protess, & Dewan, Nov. 21, 2017; available [here](#)) DOJ investigations and actions like the one in Baltimore were combined with a larger DOJ collaborative effort carried out over the last several years with law enforcement agencies around the country to reform police practices in a way that reduced harm, built trust between the police and the community, and better enabled the police to carry out their public safety mission. We, too, noted the potentially significant role the DOJ was taking in advancing the jurisprudence on the use of force in police encounters with persons with mental disabilities (July 2015 article reviewing the U.S. Supreme Court’s opinion in *Sheehan v. City and County of San Francisco*, 135 S.Ct 1765 (2015); available [here](#)). The hope was expressed in that 2015 article that the growing impact of these practices would change the norms for police conduct, and set a new standard for assessing and determining what conduct constitutes excessive use of force in these encounters.

The DOJ is now dramatically changing its approach to its work with local law enforcement, however, to the disappointment of many of the local governments and departments that had sought DOJ assistance (Eder, Protess, & Dewan). That change is likely to delay the evolution of the jurisprudence of excessive force. Nonetheless, many localities see the value of training officers to engage individuals who are in mental health crisis in a manner that de-escalates the crisis and enhances safe resolutions. In particular,



Crisis Intervention Team (CIT) training has been adopted by increasing numbers of local and state police departments, including many in Virginia. In a 2012 article (available [here](#)), authors Amy C. Watson, PhD and Anjali J. Fulambarker, MSW describe and discuss the key components of the CIT model, and the variations on the model that have emerged in different jurisdictions. They note that while there has not been enough research to deem CIT an “evidence-based practice,” it is considered a “best practice” model in law enforcement and is receiving increasing acceptance in police departments because officers see and appreciate the positive changes the model brings to their understanding and practices and to the results in their engagement with individuals with mental disabilities or in mental health crisis.<sup>26</sup> These positive outcomes may eventually serve to change the standards for police interaction with individuals who have mental disabilities or are in crisis.

### Developments in the Courts

In contrast to most law enforcement agencies being interested in practice reforms, most courts seem reluctant to establish a constitutional standard for police in their use of lethal force when encountering an unarmed person in mental health crisis. The decision of the Fourth Circuit in *Holloman* appears to reflect that reticence. It is possible that the Fourth Circuit did not consider *Holloman* the right case for establishing such a standard. However, Prof. Braga makes a compelling argument that the facts of *Holloman*, when properly framed and considered, provided a clear opportunity for the Court to set out needed standards for police conduct in such situations—an opportunity the Court declined.

### A Step Forward in Developing a Standard for Law Enforcement Conduct

As Prof. Braga notes, the Fourth Circuit had addressed one facet of law enforcement encounters with people in mental health crisis with a January 2016 holding that suggested a willingness to develop this jurisprudence and provide officers with guidance on their conduct. In *Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir., 2016), the Fourth Circuit set out both notice and guidance on officers’ use of “serious injurious force” (and tasers in particular) when officers attempt to assume custody of a person who is compromised by mental illness and *passively* resists the officers.

The tragedy of the *Armstrong* case unfolded when Mr. Armstrong, who suffered from bipolar disorder and schizophrenia, had been brought to the hospital by his sister after he stopped taking his medications and began to exhibit bizarre behaviors. After becoming frightened at the hospital, Mr. Armstrong fled. Officers were called to pick up Mr. Armstrong, who was found wandering around the street at the hospital entrance, oblivious to traffic and engaging in bizarre behaviors. When the officers coaxed him off

---

<sup>26</sup> Unfortunately, because CIT training involves the commitment of an officer to a week-long, 40-hour training course, the many departments that have few staff and small training budgets may not be able to participate in this important change in policy and practice without meaningful support from state governments.

the street and then approached him, he sat down and wrapped himself around a stop sign post and refused to move. Unable to pry Mr. Armstrong loose, the officers, after warning him they would do so, “tased” him five separate times over the course of two minutes, which *increased* Mr. Armstrong’s resistance. As the officers finally pried Mr. Armstrong from the post and both handcuffed and shackled him, Mr. Armstrong stopped breathing and died. The encounter with the officers lasted just over 6 minutes.

A three-judge panel of the Fourth Circuit Court of Appeals agreed that the officers were entitled to qualified immunity because there was no clear case law precedent giving the officers clear notice that their conduct amounted to excessive force. However, two of the judges found that the officers’ conduct was “objectively unreasonable,” thereby providing notice to officers regarding the Fourth Amendment standards governing their conduct in future situations of this kind. In reaching this finding, the judges used a four-pronged analysis to weigh the officers’ intrusion on Armstrong’s Fourth Amendment interests against the governmental interests at stake:

- (1) “The severity of the crime at issue” – Mr. Armstrong had not committed a crime. “The government’s interest in seizing Armstrong,” the Court wrote, “was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.”
- (2) “The extent to which the subject poses an immediate threat to the safety of the officers or others” – Although Mr. Armstrong’s fleeing from the hospital, his wandering along a street while in a psychotic state, and his physical resistance to being taken into custody provided justification for some use of force to prevent harm, the “justified degree of force” would have been the force “reasonably calculated to prevent Armstrong’s flight.”
- (3) Whether the suspect “is actively resisting arrest or attempting to evade arrest by flight” – Although Armstrong clearly was resisting being taken into custody, he was “stationary, non-violent, and surrounded by people willing to help him return to the Hospital.” This was neither an urgent nor dangerous situation, but rather a “static impasse.”
- (4) The “proportionality” of the force applied “in light of all the circumstances” to determine its “reasonableness” – The Court found that the situation these officers faced with Armstrong involved “few exigencies” and justified “only a limited degree of force.” “Immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response,” the Court ruled.

After noting that tasers are widely recognized as causing “excruciating” pain and that the officers’ tasing of Mr. Armstrong violated well-recognized national standards on taser use (including the taser company’s own guidelines), the Court set out its “precedent” on taser use:

...tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser.

The Court then expanded this standard for the use of tasers to the following standard on the use of any “serious injurious” force:

Our precedent, then, leads to the conclusion that a police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, “physical resistance” is not synonymous with “risk of immediate danger.”

(See also the DMHL review of the *Armstrong* case in the March 2016 issue found [here](#).)

### Declining to Take the Next Step

As Prof. Braga points out, the facts in *Holloman*, decided nine months later in October 2016, seemed ripe for similar treatment. The officers were well-apprised of the situation. They were aware of Mr. Johnson’s mental health history. (Prof. Braga notes that, in *Armstrong*, the Fourth Circuit ruled that the mental health of the person encountered by an officer constitutes one of the “facts and circumstances that a reasonable officer on the scene would ascertain and take into account when deciding when and how to use force, and that “officers who encounter an unarmed and minimally threatening individual who is ‘exhibit[ing] conspicuous signs that he [i]s mentally unstable’ must de-escalate the situation and adjust the application of force downward.”). The officers also knew, from Mr. Johnson’s mother (Ms. Holloman) that a taser had been used successfully by officers in the past to take Mr. Johnson into custody. At the time of the officers’ arrival at the home, Mr. Johnson was outside the home. He was not engaging in any behavior that posed a threat to any person at that time. The officers had the opportunity to at least maintain, if not de-escalate, the situation until additional support could arrive. Instead, the officers almost immediately escalated the situation by ordering Mr. Johnson into the home and immediately trying to physically seize and subdue him. They also intentionally left themselves without access to the weapon identified to them as being an effective non-lethal tool—the taser.

Prof. Braga argues that “[t]he fact pattern in *Holloman* presented a paradigmatic situation for application of the de-escalation approach” directed by the Fourth Circuit in *Armstrong* for officers encountering a person in mental health crisis, yet the Fourth Circuit did all that it could to avoid such a finding. Instead, the Court emphasized that Ms. Holloman told the officers that Mr. Johnson had destroyed property, and that Mr. Johnson physically fought back when the officers attempted to seize him. Left unmentioned and unaddressed by the Court were the officers’ decision to initiate the actions that predictably turned a stable situation into a physical altercation, and the officers’ decision to reject ahead of time the use of less lethal force—namely, a taser—in the (very predictable) event of an altercation, despite the information that a taser had been successfully used with Mr. Johnson in the past.

The primary distinction between Mr. Johnson and Mr. Armstrong that appears to be relevant to the Fourth Circuit was that Mr. Johnson *actively* resisted the officers' attempt to seize him (to the point that he was actually holding down one officer, who could reasonably have feared physical harm from Mr. Johnson), while Mr. Armstrong *passively* resisted officers' attempts to seize him and posed no threat to any of them.

Notably, the limits of the application of *Armstrong* appear to have been foreshadowed in the concurring opinion submitted in that case by Judge Wilkinson, the only judge to hear both *Armstrong* and *Holloman*. Judge Wilkinson, while concurring in the finding that the officers in the *Armstrong* matter were protected by qualified immunity, strongly objected to the majority's ruling that the officers' actions were objectively unreasonable and amounted to excessive use of force. Judge Wilkinson questioned a number of the majority's findings, including the finding that Armstrong posed no real danger. Judge Wilkinson noted there was danger in Armstrong's self-destructive behaviors that had prompted his sister to bring him to the hospital, and in Armstrong's potential to suddenly bolt into traffic, and in his kicking at the officers when they attempted to place cuffs on him. Judge Wilkinson also questioned the adequacy of the majority's direction to officers regarding future action when encountering individuals in mental health crisis, noting that what constitutes "resistance" by an individual or what poses a "serious safety threat" sufficient to allow the use of force is highly dependent upon particular facts and circumstances. He argued that the majority's standards for the use of force would be difficult for officers to apply to the complex facts involved in quickly evolving events on the streets, and that this could result in many officers, concerned about liability and uncertain of what to do, deciding to do *nothing*—a decision that can also have serious negative consequences.

Judge Wilkinson's reticence to second-guess officers responding to a volatile situation appears to have prevailed in the Fourth Circuit's decision to dismiss the plaintiff's claim in *Holloman*. The Court's unpublished opinion did not venture to analyze the facts of the case under the four-pronged analysis of excessive force used in *Armstrong*. Had it done so, the Court would have had difficulty escaping Prof. Braga's strong arguments that the officers' actions were objectively unreasonable.

#### The Limits Set by the U.S. Supreme Court

It may also be that the shadow of the U.S. Supreme Court's decision in *Sheehan*, cited above, hangs over the *Holloman* case. The facts of *Sheehan* are closer to those in *Holloman* in terms of active resistance by the person in mental health crisis. Ms. Sheehan had stopped taking her medications, and her condition and behavior had steadily deteriorated. Two officers were called to her group home. When the officers entered Ms. Sheehan's room the first time, she responded as she had to others entering the room: she brandished a "bread cutting knife," threatened to kill the officers unless they got out, and started walking toward them. The officers responded by closing the door. Ms. Sheehan remained in her room. Even though other officers trained in de-escalating situations like this had been called to the scene and were on their way, and even though police

departmental standards clearly directed officers in such situations to step back and use de-escalation and negotiation strategies instead of confrontation, the officers quickly re-entered Ms. Sheehan's room with their guns drawn. When Ms. Sheehan reacted just as she had the first time, the officers shot her multiple times and almost killed her.

The Ninth Circuit found that the officers' conduct was objectively unreasonable and that the petition stated a valid claim of excessive use of force. The Court noted that the officers' *first* entry into the room did not violate excessive force standards. It was because the officers themselves escalated the situation by *re*-entering the room, with guns drawn, despite knowing Ms. Sheehan's mental health condition and her likely response to their re-entry, and despite knowing that Ms. Sheehan posed no discernible danger to anyone outside her room, and that trained officers were on their way, that their shooting of Ms. Sheehan would constitute excessive use of force. The Court also ruled that there was sufficient existing case law to put the officers on notice that the actions they took constituted excessive use of force. The officers appealed.

The U.S. Supreme Court almost summarily dismissed the Ninth Circuit's decision, finding that there was *no* existing case law giving the officers notice that their actions constituted excessive force, so that the officers were protected by qualified immunity. The Court also declined to address whether the officers' conduct was "objectively unreasonable." The Court gave no weight to the Ninth Circuit's finding that the officers themselves created the danger in that confrontation by choosing to confront with lethal force a person who clearly was in mental health crisis and unable to respond rationally to the officers, and who posed no danger to the officers or others if the officers simply stayed on the other side of the door to Ms. Sheehan's room. The fact that the officers violated their own departmental standards in doing this was of no moment to the Court.

### Conclusion

It is hard to resist equating the door to Ms. Sheehan's room with the door at the back of Ms. Holloman's home. The decisions of the officers in both cases to open those doors predictably created the dangers that resulted in life-threatening injuries to Ms. Sheehan in the one case and the death of Mr. Johnson in the other. While the courts' reticence to "second-guess" police officers in their handling of volatile and difficult situations in the community is understandable, the failure of the courts to set better standards for officers' use of force in situations like these will continue to have consequences for those in the community experiencing mental health crises. With the recent retreat by the DOJ from actively helping local law enforcement improve the quality of their response to individuals with mental disabilities and those who are in crisis, it appears that it will fall increasingly to local and state law enforcement to raise the quality of law enforcement response through improved training and professional standards. One can hope that the improved outcomes for everyone from implementing programs like CIT will promote positive change. For the time being, it appears that litigation may not be a significant tool for bringing about such change.

## IV. Case Law Developments

### Federal Circuit Court Decisions

**Note regarding ongoing case:** Brendan Dassey’s case is widely known due to the Netflix series “Making a Murderer.” Given the widespread interest in the case, we briefly note the June 22, 2017 opinion by a 3-member panel of the 7<sup>th</sup> Circuit (*Dassey v. Dittman*, 860 F.3d 933 (7<sup>th</sup> Circuit)) even though that opinion was later vacated by the August 4, 2017 grant to be reheard *en banc*:

Fifth Amendment right against self-incrimination; voluntariness of confession by minors and persons with cognitive deficits: Seventh Circuit grants habeas corpus petition of minor convicted of murder and rape, finding that the state courts failed to consider the “totality of circumstances” affecting the voluntariness of the minor’s confession following extended police interrogation. However, rehearing *en banc* was granted, vacating the opinion.

**Violent sex offenders; due process:** Fourth Circuit rules that a motion for discharge by a civilly committed sex offender under the Adam Walsh Child Protection and Safety Act must be heard by the district court if, after meeting prescribed time requirements, the motion contains “sufficient factual matter, accepted as true, to state a claim for discharge” that is “plausible on its face.”

*United States v. Maclaren*, 866 F.3d 212 (4th Cir. 2017).

**Background:** In 2009, Donald Maclaren was civilly committed pursuant to the Adam Walsh Child Protection and Safety Act. In 2015, Maclaren filed a motion requesting a hearing to determine whether he was eligible for conditional release. The government opposed the motion, arguing that Maclaren’s mental condition had not improved since the time of his commitment. The district court held that to obtain a release hearing, an Adam Walsh Act detainee must “state with particularity the extent to which Respondent’s psychological/psychiatric condition has improved since he was committed and what, if anything, Respondent has done to meet the conditions of release.” Applying this standard, the district court denied Maclaren’s motion for a hearing, and Maclaren appealed.

**Holding:** The Fourth Circuit reversed and held that the district court incorrectly applied the strict evidentiary standards required by the statute to the motion for a hearing, rather than at the hearing itself. The Fourth Circuit held that a court should grant an Adam Walsh detainee’s motion requesting a discharge hearing if the detainee’s motion “contains sufficient factual matter, accepted as true, to state a claim for discharge that is plausible on its face.” The case was remanded with instructions for the district court to apply this standard to Maclaren’s motion for a discharge hearing.

**Discussion:** The Fourth Circuit suggested that a detainee's advancing age or changes in his medical condition due to either the passage of time or developments in our understanding of those factors, could be sufficient evidence to show a change in circumstances sufficient for an Adam Walsh detainee's release. Specifically, the court referred to the recent switch to the DSM-5 as one source for potentially relevant new understandings of mental health conditions. The Fourth Circuit left the question of how these factors may apply to the district court to answer during discharge hearings.

**Competency to be executed: Fifth Circuit finds petitioner who was convicted of murder and sentenced to death has a due process right to a hearing and funds for counsel and mental health experts to pursue a claim that he is not competent to be executed due to his serious mental illness.**

*Panetti v. Davis*, 863 F.3d 366 (5th Cir. 2017).

**Background:** Scott Panetti was convicted of the 1992 killing of his wife's parents and sentenced to death. The Texas Court of Criminal Appeals (TCCA) upheld his conviction and sentence. Panetti filed numerous habeas corpus petitions in both state and federal court, one of which reached the Supreme Court in 2007 (*Panetti v. Quarterman*, 551 U.S. 930 (2007)). In that case, the Court held that a prisoner is incompetent to be executed if he is unable to comprehend the meaning and purpose of the execution. The present case stems from a 2014 petition for an emergency hearing to determine Panetti's competency after a date for his execution was set. The petition requested a stay of execution to allow time to meaningfully contest his competency for execution as required by due process under *Ford v. Wainwright*, 477 U.S. 399 (1986). Panetti also submitted related motions for funding for counsel and expert assistance. The TCCA denied Panetti's motions and he appealed to the Fifth Circuit.

**Holding:** The Fifth Circuit held that due process required the state to provide funding for counsel and expert assistance to support Panetti's claim that he is incompetent to stand trial.

**Discussion:** The Fifth Circuit explained that a district court may deny a petitioner's request for funds for federal habeas relief when the petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought-after assistance would only supplement prior evidence."

At the time of Panetti's scheduled execution in 2014, Texas did not require any notice to a prisoner's counsel when a date had been set for the prisoner's execution. The Texas legislature has since amended the law to require notifying prisoner's counsel when an execution date has been set to allow enough time for counsel to fairly prepare a defense. The Fifth Circuit did not rule on this notice requirement, but did suggest that such notice is required by due process.

**NGRI acquittees; constitutional standards for release from civil commitment: Fifth Circuit rules that, although due process requires a finding of both current mental illness and dangerousness in order to maintain the civil confinement of an NGRI acquittee, the trial court’s determination of dangerousness may be based on the acquittee’s potential for dangerous conduct.**

*Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017).

**Background:** Carlos Poree shot ten people in 1977, killing one. Poree was eventually found not guilty by reason of insanity and has been in the custody of the Eastern Louisiana Mental Health System since 1999. Under Louisiana law, an individual may be transferred to a less restrictive setting after a recommendation from the superintendent of the mental health facility to a review panel. If the review panel recommends that the person be discharged, it will make a recommendation to the court and a hearing will be held. At the hearing, the state, if it is seeking continued confinement, has the burden of proof to show that the person is mentally ill and dangerous. Poree went through this process three times between 2002 and 2009, and the court denied Poree’s request for transfer each time. Poree sought federal habeas corpus relief after a state court denied his most recent request in 2010 to be transferred to a transitional facility. In reaching its decision, the state court found that Poree was mentally ill and *potentially* dangerous. The federal district court denied Poree’s habeas petition, and he appealed to the Fifth Circuit.

**Holding:** The Fifth Circuit explained that a grant of federal habeas relief requires that a state court’s decision be contrary to clearly established Supreme Court precedent. The Fifth Circuit denied Poree’s habeas petition after a finding that the Supreme Court has not clearly established that continued civil commitment requires proof of actual dangerousness, rather than potential dangerousness.

**Discussion:** The Fifth Circuit noted that the state court’s decision to deny Poree’s petition for discharge appeared to be contrary to Louisiana state law. The Fifth Circuit explained that under Louisiana law, a court must find that there is a reasonable expectation that the individual poses a substantial risk of harm to deny discharge from civil commitment, but the state court did not make such a finding. However, the Fifth Circuit explained that it was limited to granting relief for violations of federal law, and Poree was limited to Louisiana state courts for relief from violations of Louisiana state law.

**Dissent:** One dissenting Circuit Judge was of the opinion that the “potential” dangerousness standard was contrary to Supreme Court Precedent. The Circuit Judge explained that “[b]ecause the state court's standard of potential dangerousness strips the dangerousness precondition of meaning, I would find that the state court's decision was contrary to clearly established Supreme Court law. Civil confinement is not punitive. It may not be used to accomplish what the criminal system could not—here, a life sentence. The systems are distinct in both justification and operation. They will remain so only if



courts are faithful to the requirements of continued civil confinement. The state court decision went beyond those bounds in direct conflict with Supreme Court law.”

**Excessive force ; qualified immunity: Sixth Circuit upholds summary judgment in favor of law enforcement officers sued for use of excessive force by estate of man who died while being physically subdued and tasered by the officers in response to his acting out behaviors and active resistance of the officers**

***Roell v. Hamilton Cty., 870 F.3d 471 (6th Cir. 2017).***

**Background:** Roell suffered from mental illness, including schizoaffective disorder and paranoid delusions. Roell’s symptoms could be controlled by medication but he stopped taking his medication in June 2013 and began exhibiting signs of mental decompensation by early August. On the night of August 12, Roell entered a state of excited delirium and damaged his condominium, scattering debris and household items in and around the building. He then threw a flower pot through a neighbor’s window. The neighbor briefly confronted Roell before calling 911 to report that Roell was “acting crazy.” Two police officers arrived and found Roell naked except for a t-shirt and muttering unintelligibly about water. The responding police officers reported that Roell was holding a hose and a garden basket. Roell approached the officers still holding the hose and basket. The officers struggled with Roell, but had difficulty subduing him even after a third officer arrived. Eventually the officers were able to handcuff Roell after deploying their Tasers on three separate occasions. Roell continued to struggle and kick with his legs after he was handcuffed, so the officers put him in leg shackles. While restrained, Roell twice went limp and began to snore before waking up and thrashing around again. The officers saw him do this twice before noticing that Roell had stopped breathing and had no pulse. Roell was later pronounced dead at the hospital. A coroner later ruled the cause of death to be “excited delirium due to schizoaffective disorder.”

The executrix of Roell’s estate filed a claim for excessive force against the officers pursuant to 42 U.S.C § 1983. Defendants filed motions for summary judgment claiming qualified immunity. The district court granted the motions and plaintiff appealed.

**Holding:** The Sixth Circuit held that qualified immunity applied to the excessive force claims against the officers.

**Discussion:** The Sixth Circuit explained that in evaluating qualified immunity in excessive force claims, the court asks two questions: (1) whether the officer violated the plaintiff’s constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident. The court then discussed the standard for evaluating excessive force under the Fourth Amendment which was articulated by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Graham*, the Court established an objective reasonableness test for evaluating excessive force claims. The Court also articulated three factors that can be used to determine the objective reasonableness of police use of force: “(1) the severity of the crime at issue, (2)

whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.” The Sixth Circuit applied these factors and found that the officers’ use of force against Roell was objectively reasonable.

**Competence to stand trial; ineffective assistance of counsel: Seventh Circuit rules that defendant who had entered guilty plea to a felony charge is entitled to a hearing on whether he was competent at the time to enter that plea, as neither his counsel nor the court made adequate inquiries despite evidence of his serious mental illness.**

*Anderson v. United States*, 865 F.3d 914 (7th Cir. 2017).

**Background:** Denny Ray Anderson pleaded guilty to being a felon in possession of a firearm and was sentenced to 180 months’ imprisonment. When the district court accepted Anderson’s guilty plea, the court had only a general knowledge of Anderson’s mental health problems. The court knew that Anderson had been diagnosed with paranoid schizophrenia and that he was on psychotropic medication, but did not know what other illnesses Anderson had, what medication he had been prescribed, or how the drugs affected his functioning. The court also was unaware that Anderson had inconsistent access to his medication while in jail awaiting trial. His appointed counsel, who had observed Anderson behaving unusually at points since his detention began, never requested a competence evaluation or hearing. Anderson’s plea agreement prevented him from directly appealing his conviction and sentence. Anderson filed a motion under 28 U.S.C. 2255 seeking collateral relief from his conviction and sentence. The motion alleged that the guilty plea was not knowing and voluntary due to his mental illness and ineffective assistance of counsel for the failure to raise a capacity claim. The district court rejected the petition and Anderson appealed.

**Holding:** The Seventh Circuit held that Anderson was entitled to an evidentiary hearing relating to his competence to enter a guilty plea and his ineffective assistance of counsel claim.

**Discussion:** The court explained that a motion for such an evidentiary hearing should be granted if the prisoner alleges facts that, if proven true, would entitle him to relief, and that the petitioner’s burden for receiving a hearing is relatively light. The Seventh Circuit explained that there was not enough evidence to rule conclusively on Anderson’s claims without an evidentiary hearing to determine the merits.

The Seventh Circuit also explained that Anderson’s capacity claim was closely related to his ineffective assistance of counsel claim. The court suggested that if the capacity claim failed after an evidentiary hearing, then it would be difficult to show the necessary prejudice for the ineffective assistance of counsel claim for failing to raise a capacity claim.

**Eighth Amendment right of jail inmate to be free from deliberate indifference to risk of suicide; qualified immunity: Seventh Circuit denies motion for summary judgment and claims of qualified immunity by jail deputy and contract nurse in suicide case, where deceased inmate's estate alleged defendants failed to follow jail's suicide protocols despite testing that showed maximum suicide risk; private contract nurse found ineligible to invoke qualified immunity.**

*Estate of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017).

**Background:** Clark, who struggled with alcoholism and depression for years, committed suicide five days after entering the custody of the Green Lake (Wisconsin) County Jail. During the previous two years, Clark had been admitted into the Green Lake County Jail eight times. While in custody, Clark was frequently treated for depression and given medication to treat his depression. The jail also documented Clark's suicide risk, which included incidents of self-harm and at least one prior suicide attempt. The officers on duty at the time of his death did not know that Clark had a high risk of committing suicide. When he entered the jail, however, he was assessed as having a maximum risk of suicide based on a Spillman Initial Inmate Assessment. The intake staff who were aware of that risk did not initiate the jail's suicide prevention protocol, which would have included treatment, placement in a special suicide prevention cell, and increased monitoring by jail staff. Clark's estate filed suit under 42 U.S.C. § 1983 alleging the intake staff violated Clark's Eighth Amendment rights by acting with deliberate indifference toward Clark's known risk of suicide. The district court denied motions seeking qualified immunity by the intake staff who failed to follow the suicide protocol. The court found numerous issues of material fact regarding Clark's suicide risk, the defendants' knowledge of that risk, and who was responsible for initiating the suicide protocol and stated that it was clearly established that inmates have the right to be free from deliberate indifference to a known risk of suicide.

**Holding:** The Seventh Circuit affirmed the denial of summary judgment and held that qualified immunity did not apply because it is clearly established law that inmates have the right to be free from deliberate indifference to a known risk of suicide.

**Discussion:** The Seventh Circuit considered the question of whether a private contractor may invoke a claim for qualified immunity. One of the defendants, a private healthcare contractor, relied on the Supreme Court's decision in *Filarsky v. Delia*, 566 U.S. 377 (2012) to argue that Seventh Circuit precedent denying qualified immunity to private healthcare contractors should be overruled. In *Filarsky*, the Supreme Court extended qualified immunity to a private lawyer who worked part-time for a municipality. After a detailed analysis of the relevant cases, the Seventh Circuit declined to extend the reasoning from *Filarsky* to include private healthcare contractors. The Seventh Circuit held that privately employed medical personnel in jails are ineligible for qualified immunity.

**Mitigation of criminal sentence based on mental illness of defendant: Tenth Circuit upholds dramatic lowering of defendant’s sentence for kidnapping from the term recommended by sentencing guidelines due in part to the defendant’s mental illness.**

*United States v. DeRusse*, 859 F.3d 1232 (10th Cir. 2017).

**Background:** Joseph DeRusse kidnapped his ex-girlfriend with a BB gun while suffering from a then-undiagnosed mental health condition. DeRusse was apprehended eight hours after the kidnapping. He pled guilty to one count of kidnapping. DeRusse had no prior criminal history, and a Presentence Investigation Report (PSR) gave an advisory sentence range of 108-135 months. The PSR described the significant impact of the kidnapping on the victim, which included diagnoses of major depressive disorder, anxiety, and post-traumatic stress disorder. The PSR also detailed DeRusse’s difficult family history and a report from a forensic psychologist diagnosing him with major depressive disorder and obsessive-compulsive disorder. There was also evidence that since the kidnapping, DeRusse had been seeing a therapist and a psychiatrist. He was also on medication, which had improved his mental health. The court also reviewed numerous letters from family and friends who described the kidnapping as completely out of character for DeRusse. After reviewing the case and materials submitted, the judge sentenced DeRusse to time served (approximately 70 days) followed by five years’ supervised release. The judge explained the sentence on the basis of aberrant behavior, referring to a lack of any history of similar conduct in the past. The court also supported the sentence on the basis of DeRusse’s mental illness at the time and subsequent successful mental health treatment. The judge explained that DeRusse’s mental illness “does not justify what he has done, but it’s a factor to take into account.” The government appealed the substantive reasonableness of the sentence, arguing that the district court gave improper weight to DeRusse’s mental illness.

**Holding:** The Tenth Circuit, applying an abuse of discretion standard of review, found no clear error in the weight the court gave to DeRusse’s mental illness and held that the sentence was not outside the wide range of rationally permissible choices available at sentencing. The Tenth Circuit affirmed the sentence imposed by the district court.

**Dissent:** One dissenting judge, focusing on the seriousness of the crime of kidnapping, called a sentence of 70 days in jail “ludicrous.” The dissenting judge discredited the weight given to the mitigating factors and explained that the crime of kidnapping would be out of character for the vast majority of people” and that no one was of the opinion that DeRusse’s mental illness negated his intent to commit the crime. The dissent also criticized the majority for focusing on the immaturity of both the defendant and the victim in reaching the sentencing decision, calling the crime of kidnapping at gunpoint a very serious felony. The dissent concluded that a sentence of 70 days was such a far departure from the recommended sentence of 108-135 months’ confinement that it was beyond “the bounds of permissible choice.”

**Forcible administration of antipsychotic medication; due process; Sell doctrine:** Tenth Circuit rules that defendant hospitalized for restoration to competency to stand trial has filed a plausible claim of a due process violation by hospital staff when he alleges that he was forcibly medicated without any finding that he posed a danger to self or others or that he met the *Sell* standards for forcible medication to restore him to competency.

*Winkel v. Hammond*, 2017 WL 3225632 (10th Cir. July 31, 2017).

**Background:** Robert Winkel filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 alleging that staff at the Larned State Security Hospital violated his constitutional due process rights. Winkel's complaint alleged that hospital staff forcibly administered antipsychotic medication to him while he was admitted for evaluation of his competency for trial. The complaint alleged that he was not dangerous, that the court did not hold a hearing to determine whether he should be forcibly medicated, and that hospital staff forcibly medicated him to discourage him from refusing to take his prescribed medication. The district court ordered the hospital to review Winkel's allegations and prepare a *Martinez* report (a report, based on *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978), requiring state officials to thoroughly investigate allegations, submit affidavits, and provide copies of grievances and other relevant documents). The hospital filed the *Martinez* report and upon review, the district court dismissed Winkel's complaint for failure to state a claim for relief. The district court concluded that the two forcible injections of antipsychotic medication Winkel received were the result of administrative determinations by the hospital staff based on his medical condition. The court found that the injections were appropriate and necessary to prevent Winkel from harming himself or others. Winkel appealed the dismissal of his complaint.

**Holding:** The Tenth Circuit ruled that the district court erred in dismissing Winkel's complaint because it impermissibly used the *Martinez* report to resolve factual disputes and failed to give Winkel an opportunity to respond to the report. The court also concluded that assuming Winkel's alleged facts to be true, he plausibly pleaded a Fourteenth Amendment violation. The court reversed the ruling of the district court and remanded for further proceedings.

**Discussion:** The Tenth Circuit, quoting language from *Sell*, explained that a court must consider whether the government has shown a sufficient state interest in forcibly medicating an inmate to overcome the inmate's interest in refusing the medication.

**Ineffective assistance of counsel:** D.C. Circuit reverses defendant's conviction for attempted sex crime involving a minor due to defense counsel's failure to properly consider mental health expert findings regarding defendant's mental condition, with the result that defense counsel wrongly pursued his own unsupported theory and neglected expert evidence regarding defendant's capacity to form the requisite criminal intent.

***United States v. Laureys*, 866 F.3d 432 (D.C. Cir. 2017).**

**Background:** Brandon Laureys was convicted of attempted coercion and enticement of a minor, and travel with intent to engage in illicit sexual conduct. His conviction stemmed from an online chat with an undercover detective during which Laureys discussed his desire to meet to have sex with a nine-year-old girl. He was arrested after meeting the undercover detective at the planned location for the sexual encounter with the girl. Laureys’s counsel contacted specialists in sexual disorders in preparation for trial. Despite consulting several experts, Laureys’s counsel did his own online research to develop a theory of diminished capacity due to “cybersex addiction.” After selecting an expert witness, counsel did not consult with the expert about Laureys’s diagnosis. Counsel also repeatedly failed to inform the expert about scheduled trial dates, which prevented the expert from being sufficiently prepared to reach conclusions and testify. One week before trial, counsel contacted a different expert seeking support for counsel’s own “cybersex addiction” theory. This expert was unable to offer any assistance, and defense counsel abandoned the theory altogether at trial. He instead argued that Laureys was only fantasizing during his chats with the undercover detective. Laureys gave graphic and damning testimony during trial to support this fantasy defense. He was convicted by a jury and sentenced to 20 years in prison.

Laureys appealed his conviction claiming ineffective assistance of counsel. The district court denied Laureys’s claim, concluding that counsel’s failure to obtain expert testimony for trial was not for lack of trying. The court also concluded that Laureys failed to show prejudice from the lack of expert testimony because there was no evidence that Laureys would have declined to testify had an expert provided testimony at his trial.

**Holding:** The D.C. Circuit concluded that Laureys was denied effective assistance of counsel, reversed the conviction, and remanded his case for a new trial.

**Discussion:** The D.C. Circuit concluded that defense counsel’s conduct in forming a defense theory based on his own online research rather than the opinions of the experts he consulted to be sufficiently deficient to support an ineffective assistance of counsel claim. The court also concluded that expert testimony could have put Laureys’s conduct and testimony in the proper clinical context to potentially mitigate the evidence against him. The court found sufficient prejudice from the lack of expert testimony because even if Laureys had given the same graphic testimony regarding his fantasies, an expert may have been able to frame that testimony from a detached clinical perspective that could have outweighed its impact on the jury.

### **State Court Decisions**

**Sexually violent predators; proof of likelihood to re-offend: Washington Supreme Court rules that an adult’s convictions as a juvenile can be “predicate offenses” supporting a finding that the person meets the criteria for continued civil commitment as a sexually violent predator.**

*In the Matter of the Detention of Troy Belcher, 399 P.3d 1179 (Wash. 2017).*

**Background:** Belcher was convicted of rape at age 13 and was convicted of attempted rape at age 15. He was committed to Juvenile Rehabilitation following each conviction. At age 19, while in the custody of the Department of Corrections, he was charged with solicitation to commit murder (of his first rape victim) and intimidating a witness. He pled guilty to the latter charge and was convicted and sentenced to prison. Before his release on that charge, the state sought and obtained his civil commitment as a sexually violent predator. Belcher later petitioned to terminate his continued commitment, arguing that his commitment violated due process because: (1) his sexual crimes occurred when he was a juvenile, and the state could not prove that as an adult he was unable to control that behavior, (2) his diagnosis of antisocial personality disorder was insufficient to prove he could not control his behaviors, and (3) the assessment instrument relied on by the state’s psychologist to evaluate his likelihood to commit another sex offense did not differentiate between sexual offenses and non-sexual offenses, and therefore only measured his likelihood to commit a future violent act, not a sexually violent act as required by the SVP statute.

**Holding:** Noting the statutory standards and emphasizing that the SVP statute requires annual review of whether an individual continues to meet commitment criteria, the Court ruled that (1) “a juvenile adjudication” “may be used as a predicate offense in a continued commitment proceeding,” (2) the diagnosis of antisocial personality disorder “is enough to constitute a statutory abnormality,” with the court record showing that the diagnosis was coupled with findings of symptoms of psychopathy and clinical observations of other impairments affecting Belcher’s ability to control his behavior, and (3) the contested assessment instrument was only one of several sources utilized by the trial court to make the finding of risk of future sexually violent behavior by Belcher, and so its consideration by the court did not violate the statute or Belcher’s due process rights.

**Discussion:** The court noted that a central argument by Belcher was that the U.S. Supreme Court has recognized that children lack the volitional control of adults, and that it violated Belcher’s due process rights to commit him to the hospital as an adult for sex crimes he committed as a child. The court responded that, because the SVP commitment statute provides for annual review of a person’s commitment status and places the burden on the state to show that the person continues to meet SVP criteria, there are none of the due process implications in Belcher’s case that existed in the juvenile cases reviewed by the U.S. Supreme Court, in which juveniles were sentenced to life without parole and thereby given no opportunity to show that they had matured.

**Sexually dangerous individual; proof of likelihood to re-offend: North Dakota Supreme Court orders release of person from commitment as a sexually dangerous individual after finding the evidentiary record fails to show that the person “has a present difficulty of controlling his behavior.” A dissenting opinion argues that the Court goes beyond the requirements of the law and impermissibly substitutes its judgment for that of the district court.**

***In the Interest of Danny Robert Nelson*, 896 N.W.2d 923 (N.D. 2017).**

**Background:** Nelson was convicted of continuous sexual abuse of a child, having had repeated sexual contact and intercourse with his stepdaughter for over five years. He served seven years in prison and completed both low-intensity and high-intensity sex offender treatment programs. Prior to his release from prison, the state petitioned for his civil commitment as a “sexually dangerous individual.” Following a hearing in which the state’s expert found Mr. Nelson met commitment criteria and an independent expert found that he did not, the district court found by clear and convincing evidence that Nelson was a sexually dangerous individual and ordered his commitment. Nelson appealed, arguing violation of his substantive due process rights because he had completed sex offender treatment in prison, and further arguing that the trial court failed to specifically state the facts supporting its finding.

In a decision handed down on February 16, 2017, the North Dakota Supreme Court rejected Nelson’s argument that his completion of sex offender treatment in prison precluded his civil commitment, but it did find that the trial court erred in two ways: (1) it did not specifically find whether Nelson was likely to engage in further sexually predatory conduct, and (2) it did not specifically find whether Nelson had a “present serious difficulty controlling his behavior.” The Supreme Court remanded the case to the trial court to make the missing specific findings within 30 days. The trial court found that Mr. Nelson was likely to engage in such conduct and that he was unable to control his behavior, and ordered that Mr. Nelson be committed. Nelson appealed.

**Holding:** The North Dakota Supreme Court found that the trial court’s findings were not supported by the evidentiary record, and it reversed the trial court’s commitment order and directed that Nelson be released. There was a strong dissent by one justice, arguing that the record did support the trial court’s finding and that the Supreme Court was substituting its judgment for the judgment of the trial court.

**Discussion:** In its decision, the Court noted that in *Kansas v. Crane*, 534 U.S. 407, 413 (2002), the U.S. Supreme Court upheld a state law for the civil commitment of sexually dangerous individuals against a due process challenge, but ruled that the findings of “mental abnormality” and “inability to control behavior” that must be made to support a commitment “must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” The Court found that the district court’s factual findings focused on past conduct by Nelson, not his “present” ability to control his behavior, and that the trial court failed to cite any recent conduct by Nelson to support its findings. It rejected the trial court’s determination that Nelson’s diagnosis of Unspecified Paraphilic Disorder “alone makes him likely to engage in sexually predatory conduct.” As a result, the Court found the required support for the trial court’s conclusion that Nelson was at that time a “sexually dangerous individual subject to commitment” was missing from the record. Similarly, the Court noted a



complete absence from the record of “recent examples” of behavior that would support a finding of “serious difficulty controlling behavior.”

**Dissent:** In dissent, Surrogate Judge Sandstrom argued that the record supported the trial court’s civil commitment order. Judge Sandstrom cited evidence that Nelson recently completed two sex offender risk assessments (including the Static-99R), with both assessments finding Nelson “at high risk to sexually reoffend.” The dissent also noted that Nelson himself, in clinical interviews, exhibited no insight into his disorder and his risk of again offending, and that his prior history of repeat offenses, some committed while on probation for others, evidenced an inability to control his behavior. Notably, this evidence cited by the dissent was not even mentioned in the majority opinion.

**“Special duty” doctrine:** West Virginia Supreme Court denies plaintiff’s claim that police officers were liable under “special duty doctrine” for negligently failing to take into protective custody a person with mental illness who was reported to be acting strangely and who was later struck and killed by an automobile.

*McLaughlin v. City of Martinsburg*, 2017 WL 3821808 (W.Va. Sept. 1, 2017).

**Background:** James McLaughlin was a voluntary psychiatric patient in active treatment in a Martinsburg hospital when he left the hospital, reportedly without objection from hospital staff, and went to a local Burger King. Staff at Burger King called 911 and requested that officers conduct a “welfare check” on McLaughlin because of his “abnormal behavior” there. Officers did come out and met with McLaughlin, but reported that they did not observe any behaviors from McLaughlin that gave them probable cause to hold him, and McLaughlin made no request for help. McLaughlin apparently later wandered down a public roadway, and was struck and killed by a car while walking on the road. The administrator of McLaughlin’s estate filed suit against the police department, claiming that the department breached a general duty under West Virginia statute “to provide adequate police protection” to McLaughlin, as the responding officers failed to place McLaughlin in protective custody after interacting with him. The administrator also sought a writ of mandamus to compel the police department to undergo a comprehensive review of its practices. The trial court granted the city’s motion for summary judgment, and the plaintiff appealed.

**Holding:** The West Virginia Supreme Court upheld summary judgment, as the evidence was insufficient to establish that the officers did anything to establish a “special relationship” with Mr. McLaughlin that gave rise to a duty to Mr. McLaughlin that was breached when the officers decided not to take him into custody.

**Discussion:** The Court noted that West Virginia statutory law (*W.Va. Code*, 29-12A-5(a)(5) [1986]), which grants immunity to political subdivisions from tort liability for “the failure to provide, or the method of providing, police, law enforcement or fire protection,” simply re-states the common law rule that such entities are immune from liability to individuals claiming harm from a breach of this “public duty.” The Court also

found that, because the statute tracked the common law, it incorporated the common law “special duty” rule that does *not* provide immunity for a breach of a “special duty” to provide protection to a particular individual. The Court noted that a “special duty” to a party was not triggered until the following elements existed: “(1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.” The Court found that the evidence did not establish that those required elements were met, noting that the officers did not observe any behaviors by McLaughlin that prompted any concern, that McLaughlin at no time requested any help, and that the officers took no action on which McLaughlin relied that placed him in jeopardy.

**Liability for harm by patient to third parties; “special relationship” doctrine: Nebraska Supreme Court rules that psychiatric hospital and involved medical staff asserting custodial authority over a patient due to the patient’s mental illness and danger to self or others have a duty to take action to prevent harm to “reasonably identifiable” third parties.**

***Rodriguez v. Catholic Health Initiatives, d/b/a Chi Health, et al., 899 N.W.2d 227 (Neb. 2017).***

**Background:** On August 14, 2013, Melissa Rodriguez was killed by Mikael Loyd. Rodriguez’s parents, as administrators of her estate, sued two mental health providers and their staffs and the Omaha Police Department (OPD) for negligence and wrongful death. In their suit, the parents alleged that from June to August of 2013 Rodriguez had made multiple reports against Mikael Loyd for domestic assault. On August 7, the Omaha Police Department (OPD) issued an arrest warrant for Loyd for misdemeanor assault and battery. When Loyd later contacted and met with OPD officers, he expressed “a desire to kill,” and the officers, finding Loyd to be mentally ill and an imminent danger to self or others, placed Loyd in protective custody and transferred him to Lasting Hope, a psychiatric hospital. The plaintiffs alleged that the hospital knew, or should have known, that Loyd had an outstanding misdemeanor warrant for assaulting Rodriguez, and that when placed in protective custody he had threatened to kill his mother and stated that he was a danger to others. On August 11, while Loyd was at Lasting Hope, a psychiatrist who was an employee of UNMC Physicians examined him and found that he did not pose a danger to self or others. During this time, Loyd was calling Rodriguez from the hospital phone multiple times a day (18 times on August 12 alone). Loyd also called the OPD on August 12 to turn himself in on the outstanding arrest warrant, but when OPD officers came to Lasting Hope to arrest him, facility staff refused to release Loyd to the OPD, allegedly because he was still under the emergency custody order. The plaintiffs alleged that on August 14, Loyd simply walked out of Lasting Hope on his own, without any supervision. Lasting Hope allegedly did not keep track of him and did not notify the OPD. Later that same day Loyd went to the home he shared with Ms. Rodriguez and

murdered her, and then returned to Lasting Hope, where he remained until arrested for Rodriguez's murder on August 16.

The defendants filed motions to dismiss, on the grounds that the plaintiffs failed to state a claim on which relief could be granted. The trial court granted the motions to dismiss, finding that the defendants did not owe a duty to Rodriguez, as their duty to warn or protect a third party from a patient was triggered only when the patient has communicated to them "a serious threat of physical violence" against that third party, and that there was no claim by the plaintiffs that Loyd had made such a communication to any of the defendants. The plaintiffs appealed the district court's ruling in regard to Lasting Hope and UNMC, but did not pursue an appeal against the OPD.

**Holding:** The Nebraska Supreme Court reversed and remanded, finding that the plaintiffs' allegations, if true, would state valid claims on the following grounds: (1) that Lasting Hope had assumed and exercised custody over Loyd, with the result that Lasting Hope had "a duty of reasonable care to third parties," including Rodriguez, with regard to risks posed by Loyd, (2) that Lasting Hope breached the duty it owed to Rodriguez in allowing Loyd to leave the hospital without any supervision and without any report to the police or warning to Rodriguez, and (3) that the UNMC staff evaluating Loyd had received information regarding the threat of harm made by Loyd that was sufficient to trigger a duty for staff to take action to protect a reasonably identifiable third party, namely Rodriguez.

**Discussion:** The Court ruled that the plaintiffs' allegations, if true, "show that by not releasing Loyd into the OPD's custody, Lasting Hope demonstrated that it had taken charge of Loyd and had established custody over him." Under those circumstances, a different kind of "special relationship" and a different kind of duty existed between Loyd and Lasting Hope than that cited by the district court. The Court ruled that, under the facts alleged by the plaintiffs, Lasting Hope "owed a duty of reasonable care to third parties," including Rodriguez, "with regard to risks posed by Loyd, consistent with the nature and extent of custody exhibited by Lasting Hope." The district court erred in finding that Lasting Hope did not owe a duty to Melissa.

In regard to UNMC, the Court found that the UNMC doctor who evaluated Loyd was "exposed to liability" "in the limited circumstance where information has been communicated to her which leads her to believe that Loyd poses a serious threat of physical harm against a reasonably identifiable victim." The Court ruled that the plaintiffs' complaint properly alleged that such information had been communicated to the UNMC psychiatrist.

**Criminal responsibility; self-induced intoxication:** The Hawai'i Supreme Court reverses felony assault conviction of defendant whose psychotic condition at the time of the assault was found by the trial court to be "self-induced" due to the defendant's failure to take his medication. The Supreme Court rules that state law

**requires such intoxication be caused by the introduction of substances into the body, not the failure to introduce substances.**

***State v. Eager*, 398 P.3d 756 (Haw. 2017).**

**Background:** Samuel Eager was charged with assault after attacking a stranger at a bus stop on January 29, 2013. Eager filed a motion for examination to determine whether he was competent to stand trial and whether he met the standard for a defense of lack of criminal responsibility because he was experiencing a psychotic episode at the time of the offense. The lower court appointed a three-member panel of examiners per Hawai'i Revised Statutes § 704-404. All three experts agreed that Eager was competent to stand trial, but two opined he did not meet the criminal responsibility standard and one opined that he did. Ultimately, the state did not dispute that Eager was psychotic at the time of the offense, but argued that his psychosis was self-induced because he was not taking his prescribed medication and was using marijuana. The circuit court held that Eager did not meet the criminal responsibility standard, relying on the two experts who opined he could appreciate the wrongfulness of his behavior and/or conform his behavior. The court went on to hold that Eager's failure to take his medications caused "self-induced intoxication," which is clearly excepted from the mental states that are accepted as excusing criminal responsibility under Hawai'i law (HRS § 702-230). Eager was sentenced to five years' imprisonment. He appealed, arguing that one of the experts improperly bolstered the opinion of another and that the circuit court abused its discretion in sentencing him to five years. The Intermediate Court of Appeals (ICA) rejected Eager's arguments and affirmed the circuit court's opinion.

**Holding:** The Supreme Court of Hawai'i agreed with the ICA's holding on Eager's first argument, but did not consider his second argument because it found plain error in the circuit court's holding regarding self-induced intoxication. The Supreme Court vacated the ICA's judgment on appeal and the circuit court's judgment of conviction, remanding for further proceedings.

**Discussion:** The Supreme Court noted that "Where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court" (quoting *State v. Miller*, 122 Hawai'i 92, 117 (2010)). The circuit court had reasoned that "the Defendant's psychotic and delusional behavior was as a result of the Defendant's decision not to take his prescribed medication..." (¶ 38). The Supreme Court noted that Hawai'i statute expressly defines self-induced intoxication to mean "intoxication caused by substances which the defendant knowingly introduces into the defendant's body" (HRS § 702-400(5)(b)), emphasizing the requirement of *introduction* of a substance rather than *failure to introduce* a substance.

In support of its conclusion, the Supreme Court cited a Massachusetts case, *Commonwealth v. Shin*, 16 N.E.3d 112 (Mass. App. Ct. 2014), that reached the same conclusion, quoting a portion of the opinion that listed reasons why self-induced intoxication is not analogous to a failure to take prescribed medication:

It is not at all clear that the situations are analogous; mentally ill people fail to take prescribed medication for a myriad of reasons, including, for example, side effects that may be otherwise dangerous to their health.... In addition, some people are unable to obtain the appropriate medication because of lack of money or access to medical care, or problems with necessary paperwork such as may have occurred in this case. A decision not to take a prescribed medicine, though it may be ill-advised, is different in kind from a decision to ingest alcohol or drugs that are not prescribed. In addition, some medications work better than others, or take time to become effective, and the difficulty of discerning when, exactly, someone stopped taking medication and what his mental state was at that time would be challenging at best. (pp. 1128-29)

The Supreme Court noted that in Eager’s case both marijuana use and failure to take medications were present. It held that a trier of fact in such cases must distinguish the two and “determine whether the mental disturbance would excuse the defendant’s criminal conduct absent the influence of the intoxicant.”

**Psychiatrist-patient privilege; defendant’s Sixth Amendment right to present a defense:** The Connecticut Supreme Court rules that where a defendant shows a “compelling need” for privileged psychiatric records of a homicide victim as material to his defense, “the interests of the accused must prevail over the victim’s psychiatrist-patient privilege” and an *in camera* review of the records may be undertaken.

***State v. Fay*, 326 Conn. 742 (Conn. 2017).**

**Background:** William Fay was charged with murder and convicted of second degree manslaughter for the shooting death of his roommate. At trial, he did not deny shooting the victim, but he claimed self-defense. Fay testified that the victim had a history of alcohol abuse and depression, which had worsened in the months prior to the shooting. Fay testified that the victim’s drinking and depression had previously led to violent encounters between them. Fay filed motions to obtain the psychiatrist’s testimony and records, arguing that his Sixth Amendment right of confrontation outweighed the psychiatrist-patient privilege. The state argued that the right of confrontation was not implicated because the deceased victim would not be testifying and that the privilege barred the court from reviewing the records *in camera* unless the victim’s authorized representative waived the privilege. The trial court denied Fay’s motions. Fay appealed the denial of his motions.

**Holding:** The Connecticut Supreme Court held that *in camera* review of a homicide victim’s privileged records may be undertaken when the records may be material to a defendant’s defense, found that the defendant had not made such a showing.

**Discussion:** The Supreme Court agreed with other states that had found circumstances in which privilege could be outweighed by a defendant's rights, noting that the privilege accorded a "homicide victim is significantly different than in civil cases like *Jaffee [v. Redmond]*" and that society's interest in enabling defendants to present evidence for their defense is at its height in murder prosecutions. The Court stated that it doubted that such limited disclosure allowances would reduce the number of people who seek therapy any more than other existing privilege exceptions. The Court also held, however, that a defendant must make a "showing that there is reasonable ground to believe that failure to produce the information is likely to impair" the defendant's right to present a defense. The Court applied a more stringent requirement than when a defendant seeks review of records of a witness who will testify, holding that the defendant "must demonstrate a compelling need for the privileged records, a showing predicated on the relevance of the records to the claim of self-defense, the potential significance of the records in establishing that defense, and the unavailability of alternative sources of similar information" (p. 750). The Court found that Fay had not made such a showing.

**NGRI; sentencing:** The Virginia Supreme Court finds that in a case where defendant was found guilty on a charge of felony assault for one act and was found NGRI on another charge of felony assault for an act committed a month later, the trial court's decision to order defendant to serve his prison term on his conviction before being hospitalized to treat his mental illness under the NGRI verdict did not result in a "grave injustice." A concurring opinion noted the need for clarification in statutory guidance. A strong dissent argued that existing statutory law requires a different result.

*Williams v. Commonwealth*, 2017 WL 3751532 (Va. August 31, 2017).

**Background:** Larry Williams was indicted for felony assault and battery of his wife, and was indicted approximately a week later of a second felony assault and battery charge as well as attempted murder. The first indictment was for an attack in July 2014 and the second for an attack in August 2014. Williams and the Commonwealth entered into an agreement in which he pled guilty for the July 2014 attack and pled not guilty by reason of insanity for the August 2014. The court accepted the pleas and sentenced Williams to five years' imprisonment for the July 2014 offense and ordered him into involuntary commitment for hospitalization and evaluation under the NGRI plea. The Commonwealth suggested that Williams be directed to first serve his five-year sentence before being hospitalized, and the circuit agreed with the recommendation. Williams did not object at the hearing but later appealed both cases on grounds that the circuit erred by directing that he serve the five-year sentence first.

**Holding:** The Virginia Supreme Court held that sending Williams to his prison term before hospitalization did not result in a grave injustice.

**Discussion:** The Court reviewed Williams's appeals under the grave injustice standard because he had not preserved the objections below. The Court disagreed with Williams's

contention that he was denied due process, noting that his sentencing satisfied due process and that requiring him to serve a sentence for a crime for which he pled guilty does not violate due process. The Court further noted that there is no statutory direction indicating an appropriate sequencing of incarceration and involuntary civil commitment for different crimes. The Court reasoned the sequence was not unjust because it did not deprive Williams of mental health treatment because the Department of Corrections is required by statute to provide Williams with all health treatment he needs. The Court concluded that Williams would “receive any mental health care treatment he needs while incarcerated” and that, in the case that the DOC cannot meet his needs, Williams could be transferred to a different facility, including the state hospital.

**Concurrence:** A concurring opinion by Justice Mims noted reluctance in concurring, and highlighted the need for better statutory direction. Justice Mims “urg[ed] the General Assembly to re-examine [existing statutes].” The Justice also relayed disagreement with the majority’s reliance on mental health treatment administered in prisons.

**Dissent:** Justice Powell dissented, arguing that existing statute directs the order of sentencing and commitment because sentencing is discretionary (and the court therefore had discretion to suspend imposition of the sentence) whereas involuntary civil commitment is mandatory (as statute mandates that a defendant be hospitalized upon a finding by evaluators that the defendant is mentally ill and requires hospitalization).

**Medical malpractice; exacerbation of pre-existing mental health conditions: The Virginia Supreme Court rules that in a claim by a patient that crude, offensive and sexually oriented remarks to the patient by the physician aggravated symptoms of the patient’s pre-existing multiple mental health and medical conditions, the plaintiff’s failure to designate an expert to testify that the physician’s conduct was the proximate cause of the harm experienced by the patient required dismissal under Virginia’s medical malpractice statute.**

*Summers v. Syptak*, 801 S.E.2d 422 (Va. 2017).

**Background:** Alexia Summers received care at a family medical practice in from 2010 to 2011 for psychological, emotional, and physical symptoms as a result of past and present sexual abuse and harassment. In 2014, she returned to the practice to receive treatment for high blood pressure and saw a different doctor, Dr. Syptak. Summers filed a medical malpractice suit against Syptak and the practice alleging that sexual statements made to her by Syptak caused her symptoms of PTSD, depression, and fibromyalgia to worsen. Syptak sought summary judgment, which the trial court granted because a medical malpractice plaintiff must “designate a qualifying expert to testify on the standard of care and causation” but Summers had not done so.

**Holding:** The Virginia Supreme Court affirmed the grant of summary judgment by the lower court.

**Discussion:** The Court found that Summers had not met the requirement of designating an expert to establish that a defendant “deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed.” (Va. Code § 8.01-20.1). Although Summers had obtained a report from a licensed professional counselor, the Court determined that the counselor’s evidence did not speak directly enough to Syptak’s statements as the cause of Summers’s worsened symptoms. The Court noted that discerning whether a medical practice caused a patient’s injuries is typically a complicated medical question when it involves preexisting conditions, thus an expert is needed because the question is beyond the understanding of a lay person.

## **IV. Institute Programs**

Please visit the Institute’s website at  
<http://www.ilppp.virginia.edu/OREM/TrainingAndSymposia>

The Institute appreciates participation and other support for its programs. Please share this edition of *DMHL* and share announcements of programs that may interest your professional, workplace, and community colleagues.

### **ILPPP Programs Winter-Spring 2018**

#### **OF SPECIAL NOTE:**

##### **A one-day workshop**

**The Biopsychosocial Imprint of Complex Trauma: Implications for Evaluation and Treatment in Forensic and Community Contexts with Katherine Porterfield PhD, New York University Thursday January 11 2018**

**Kate Porterfield** received her Ph.D. in Clinical Psychology from the University of Michigan, where she specialized in child and family treatment. She received the Power Fellowship at the University of Michigan to focus her clinical and research training on the needs of children who have suffered loss, either through death, divorce, or other trauma. Dr. Porterfield was a postdoctoral fellow at the NYU Child Study Center. In her work at Bellevue/NYU Program for Survivors of Torture since 1999, Dr. Porterfield provides individual and family therapy to children, adolescents and adults and supervises trainees working with survivors of torture. Dr. Porterfield has worked as a clinical evaluator on several cases of young people held in detention at Guantanamo Bay and frequently consults with attorneys handling cases involving torture and maltreatment. She has also presented extensively in the New York area and nationally on topics such as the effects of war and refugee trauma on children, clinical work with traumatized refugee families, and the psychological effects of torture. Dr. Porterfield is the Chair of the American Psychological Association's Task Force on the Psychosocial Effects of War on Children Residing in the United States.



At the conclusion of the program participants will be able to

- Conceptualize the formulation of Complex Post-traumatic Stress as an outcome of normal developmental processes of self-regulation being impaired due to chronic childhood trauma.
- Identify the dimensions of impairment present in those suffering from Complex Post-traumatic Stress.
- Discuss assessment strategies and tools for evaluating survivors of complex childhood trauma.
- Explain treatment methodologies that are effective with survivors of chronic childhood trauma

Detailed info for program, faculty, registration, continuing education:  
<http://www.ilppp.virginia.edu/OREM/AdultPrograms/Course/111>



**A one-day workshop  
Building Young People's Resilience  
with Michael Ungar PhD Dalhousie University (Nova Scotia)  
Tuesday April 24 2018**

**Michael Ungar PhD** is the Canada Research Chair in Child, Family and Community Resilience at Dalhousie University, and the founder and Director of the Resilience Research Centre. He is among the best known writers and researchers on the topic of resilience in the world. As both a family therapist and professor of Social Work, he has helped to identify important factors that influence the resilience of children and adults during periods of transition and stress. He is the author of 14 books that have been translated into five languages, numerous manuals for parents, educators, and employers, as well as more than 150 scientific papers. Dr. Ungar's immense influence comes from his ability to adapt ideas from his research and clinical practice into best-selling works like *Working with Children and Youth with Complex Needs*, *Too Safe For Their Own Good: How Risk and Responsibility Help Teens Thrive* and *I Still Love You: Nine Things Troubled Kids Need from their Parents*. His blog Nurturing Resilience appears on *Psychology Today's* website.



- At the conclusion of the program participants will be able to
- Discuss how individuals and families with complex needs use “problem” behaviors to enhance their resilience and wellbeing when more socially acceptable solutions are not available.
  - Identify evidence-informed skills associated with a social ecological approach to individual and family intervention that nurtures resilience.
  - Discuss the Child and Youth Resilience Measure, an assessment tool that can help professionals explore the hidden resilience of children and youth.
  - Define nine aspects of resilience necessary for positive development.
  - Develop strategies for working without resistance with hard-to-reach, culturally diverse children, adolescents, and their families.
  - Discuss ways services can be structured for children, youth and families to make resilience more likely to occur.

Detailed info for program, faculty, registration, continuing education:  
<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/112>

### **OTHER PROGRAMS:**

#### Assessing Risk for Violence with Juveniles

January 26 2018, 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.

Detailed info for program, faculty, registration, continuing education:  
<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/105>

Janet Warren DSW, Professor, School of Medicine, ILPPP is lead faculty. Other expert faculty will be Sara Boyd PhD, Forensic Psychologist with ILPPP, and Dewey Cornell PhD, Professor, Curry School of Education, UVA

#### Juvenile Legal Competencies: Seminar on Complex Issues

March 15 2018, Charlottesville VA: This half-day (three hour) seminar will examine more nuanced issues pertinent to juvenile competencies and will require prior reading and involve discussion within the group and possible case presentations. The topics addressed will include youths' understanding of police interactions; youths' ability to understand and appreciate the rights to silence and legal counsel; and youths' understanding of plea bargaining and the content of written and oral plea colloquies

Detailed info for program, faculty, registration, continuing education:  
<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/113>

Sharon Kelley PhD, JD, ILPPP, School of Medicine, and Heather Zelle PhD, JD, School of Law, UVA, and ILPPP

#### Conducting Mental Health Evaluations for Capital Sentencing Proceedings

March 19-20 2018, Charlottesville VA: This two-day program prepares experienced forensic mental health professionals to meet the demands of a capital sentencing case, in which the accused faces the possibility of the death penalty. Attorneys and others are welcome. The agenda includes statutory guidelines for conducting these evaluations, the nature of the mitigation inquiry, the increased relevance of intellectual disabilities, the process of consulting with both the defense and the prosecution, and ethics in forensic practice.

Detailed info for program, faculty, registration, continuing education:

<http://www.ilppp.virginia.edu/OREM/AdultPrograms/Course/109>

Daniel Murrie PhD, Professor, School of Medicine, ILPPP is lead faculty. Other faculty include David Bruck JD, School of Law, Washington and Lee University, Sharon Kelley JD, PhD, ILPPP, UVA, Bernice Marcopulos PhD, Department of Graduate Psychology, James Madison University, and Capital Mitigation Specialists.

#### Juvenile Forensic Evaluation: Principles and Practice

April 9-13 2018, 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. Day five incorporates a report writing exercise.

Detailed info for program, faculty, registration, continuing education:

<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/107>

Janet Warren DSW, Professor, School of Medicine, ILPPP is lead faculty. Other expert faculty will be Lawrence Fitch, JD, University of Maryland School of Law, Dewey Cornell PhD, Professor, Curry School of Education, UVA, Michele K. Nelson PhD, in private practice of forensic mental health evaluation, Ben Skowysz LCSW, VA DBHDS, Scott Bender PhD, UVA School of Medicine, Jeffrey Aaron PhD, VA DBHDS

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

April 9, 10, 11 2018 lectures and April 13 case exercise, Charlottesville VA: This program is especially 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 now to complete relevant qualifications to perform juvenile forensic evaluations.

Detailed info for program, faculty, registration, continuing education:

<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms/Course/114>

See faculty for the Juvenile Forensic Evaluation: Principles and Practice.

#### Assessing Individuals Charged with Sexual Crimes

May 14-15 2018, Charlottesville VA: This two-day program focuses on the assessment and evaluation of individuals charged with sexual crimes, sexual offenders including 19.2-300 pre-sentencing evaluations, and 37.2-904 assessment of sexually violent predators. The program provides discussion of legal background relevant to assessment involving sexual offenses, paraphilias, base rates of re-offending, and well-researched sexual offender risk assessment instruments. This program may meet needs of providers for renewal of SOTP certification in Virginia.

Detailed info for program, faculty, registration, continuing education:

<http://www.ilppp.virginia.edu/OREM/SexOffenderPrograms/Course/110>

Daniel Murrie PhD, ILPPP, UVA. Other faculty include Jill Ryan Esq., Office of the Attorney, Eric Madsen CSOTP, Virginia Department of Corrections, and Mario Dennis PhD, Virginia Center for Behavioral Rehabilitation.

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

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

*Developments in Mental Health Law (DMHL)* is available as a *pdf* document via two of the Institute of Law, Psychiatry and Public Policy's websites: 1) within the "Reports and Publications" section of the Mental Health Policy website, and 2) within the "Publications/Policy & Practice" section of the ILPPP's overarching website.

The complete archive of *DMHL* may be accessed electronically on the Internet at HeinOnline at <http://home.heinonline.org/>. ILPPP maintains a complete, original archive on paper from Volume 1, Number 1, January 1981.

To be notified via email when a new issue of *DMHL* is posted to the website please sign up at <http://www.ilppp.virginia.edu/MailingList>. You are welcome to share these links with others who may wish to join the list to receive *Developments in Mental Health Law*. There is no charge.

Letters and inquiries, as well as articles and other materials submitted for review, should be mailed to DMHL, ILPPP, P.O. Box 800660, University of Virginia Health System, Charlottesville, VA 22908, or sent electronically to the Managing Editor at [els2e@virginia.edu](mailto:els2e@virginia.edu). Thank you.

The Editor may be contacted at [jeogal@gmail.com](mailto:jeogal@gmail.com)

**Editor**

John E. Oliver, J.D.

**Co-Editor for Issue**

Heather Zelle, J.D., Ph.D.

**Managing Editor**

Edward Strickler, Jr., M.A., M.A., M.P.H., CHES

**ILPPP Research Assistants**

Joseph Betteley, M. Kamran Meyer

ISSN 1063-9977

© 2017