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Confidentiality: A Conundrum in Veterans Behavioral Health Care

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Great strides have been made in the research, diagnosis and treatment of Post Traumatic Stress Disorder (PTSD) since the start of the wars in Iraq and Afghanistan and in the ensuing increase in this diagnosis among returning combat veterans. Yet, despite advancements in care, many veterans still do not seek treatment. While the reasons for this differ widely, from lack of transportation to the stoic nature of those who serve in the military, none is more troubling than

concerns over confidentiality. The impact, real or perceived, that both diagnosis and reporting may have on a service member's career frequently results in the failure or hesitancy to seek mental health services.

Veterans seeking services are often concerned about whether information they disclose to a counselor will be kept confidential or released to their employer, particularly if the job they currently hold requires a security clearance. The concern for active duty service members and for those currently serving in the National Guard and Reserve components is even more pressing. Service members and veterans worry that by seeking counseling they will jeopardize their current and future military careers.

One example comes from a 28-year veteran of the United States Navy, with over a dozen deployments throughout his service, including multiple combat tours in Iraq. He held a Military Operational Specialty (MOS) as a weapons expert. He sought help after years of dealing with many of the symptoms of Post Traumatic Stress Disorder (PTSD). However, once diagnosed, he was banned from using weapons. Although he was one of the lucky ones, being able to train for another MOS and being able to stay in the Navy until retirement, the sailor describes his diagnosis as a “career ender.”

As civilian mental health providers know, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) called for “the establishment of standards and requirements for transmitting certain health information to improve the efficiency and effectiveness of the health care system while protecting patient privacy.”¹ This law, enacted in August 1996, has been a standard for healthcare providers around the country, restricting their ability to share information without the permission of their patients. Under the “Privacy Rule,”² the regulation implementing the Act, an individual’s past, present and future medical conditions are protected, as well as any individually identifiable personal information such as a Social Security Number. When sharing information between separate entities, such as employers, written consent must be obtained from the patient before any information may be disclosed. However, there are a number of exceptions to this rule, one of which is applied directly to military service members. This exception allows for, “disclosure for essential government functions” to “military command authorities” and applies to cases in which a command has concerns about a service member’s fitness for duty.³

Department of Defense Regulation 6025.18-R,⁴ “DOD Health Information Privacy Regulation,” January 24, 2003, paragraph C7.11.1.1, states that a commander can access medical records and speak with a service member’s physician for activities “deemed necessary to assure the proper execution of the military mission.” In short, the service member’s command can access protected health information to ensure that the military member is fit to carry out the necessary duties to fulfill the mission.

¹ Public Law 104-191(1996).

² 45 C.F.R. Parts 160 and 164.

³ 45 C.F.R. § 164.512(k)

⁴ The Department of Defense Regulation is available in its entirety at:
<http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf>

Simply stated, when a service member is determined to be “not fit for duty” either physically or mentally, actions are taken to remedy the issue and return him or her to duty. Depending on the cause, this may run the gamut from physical therapy, rest, surgery or counseling. If the issue cannot be remedied in a timely way, the service member may be scheduled for a “medical board” to evaluate whether he or she should be retained or discharged.

Generally, civilian practitioners will not become involved with their client’s command, but it can happen. Not only do many civilian mental health professionals work for federal agencies serving the military, but many more work for government contractors, who report directly to DoD staff. Additionally, if a civilian practitioner is working with an active duty service member, or a member of the National Guard or Reserves, they may be asked to provide documentation of services, and perhaps diagnosis. Additionally, civilian providers may be asked by a veteran to provide diagnosis information to the U.S. Department of Veterans Affairs for purposes of filing a disability and compensation claim.

In any event, it is always the best course of action to discuss these possibilities with the veteran or service member client, and if desired or necessary, to get a detailed and specific authorization (release of information) to disclose this information should any information be requested. DoD 6025.18-R, paragraph C8.2, also requires that the minimum amount of information necessary for the command to make a decision about fitness for duty be disclosed. Providers should therefore keep in mind that only the minimum amount of information necessary to make this determination should be released.

The bottom line for many active duty service members and those serving in the National Guard and Reserves continues to be whether or not they should seek treatment for PTSD, depression and other post-deployment issues and risk potential discharge.

Several factors may help them decide on the side of treatment. One major factor is that the military will look more favorably on a service member who has acknowledged his or her problems and sought treatment than on one who has attempted to hide their issues (frequently unsuccessfully) and avoid treatment.

Consideration must also be given to the impact of the veteran’s symptoms on their family and loved ones. Finally, serious mental health issues rarely just go away. The veteran could continue to suffer for many years, as has been the case with many Vietnam era veterans.

Another factor for veterans and service members holding a security clearance to consider when seeking help for mental health issues is the uncertainty about retaining their clearance. Many veterans hold jobs with the federal government or with government contractors in jobs requiring a clearance.

Many veterans and service members are concerned that seeking treatment, and a subsequent mental health diagnosis, may affect their ability to retain or to get a security clearance. However, since 2008 service members and veterans are not required to report treatment for PTSD when they apply (or reapply) for a clearance. Question 21 on Standard Form 86 (the security clearance form) asks whether a person has sought care with a healthcare

professional relating to an emotional or mental health condition. Service members may answer “no” if the care was related to adjustment from service in a military combat environment. Concern for holding a clearance should therefore no longer keep veterans and service members from seeking help for PTSD and other transition issues.

For veterans and current service members, including members of the National Guard and Reserves, there are many resources which offer confidential counseling services. In Virginia these include five Vet Centers, Military OneSource, many private counseling centers, and the Community Services Boards. Additionally, organizations such as the Virginia Wounded Warrior Program (VWWP) offer connections to a variety of other veteran services and resources, Combat Support Groups, and individual support through Veteran Peer, Family Support and Resource Specialists. The program is also equipped to help the families of veterans and service members fight through the stress resulting from deployment and combat experience.

VWWP can be accessed at www.wearevirginia.veterans.org or toll free at 1-(877) 285-1299.

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Faculty Handbook Provides Guidance in Assisting Students in Distress; FERPA Privacy Exceptions Permit Faculty Intervention/Referral

The nation continues to mourn the deaths of 20 first-graders and six of their teachers and administrators at Sandy Hook Elementary School in Newtown, Connecticut, and focusing discussion on gun control and the provision of mental health services. This debate arises again in the wake of the recent massacres in Aurora, Colorado, Tucson, Arizona, and at Virginia Tech. The perpetrators most often are troubled males in their twenties. Because they are in close contact with their students on a regular basis, faculty in both community colleges and universities often are the first to notice emotional and mental health problems and can be the first line of defense in identifying and seeking early intervention for troubled students. But how do they distinguish between students who are experiencing the normal stressors associated with

transitioning from a dependent family environment to young adulthood and quasi-independence, coupled with the pressures of succeeding in a highly competitive academic environment, from those students who may be truly dangerous either to themselves or others or both? Given the complexities of the law, including the Federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, how can faculty members respond and with whom can they share their concerns?

Faculty Handbook

The Campus Suicide Prevention Center of Virginia, located at James Madison University, released on October 1, 2012 the electronic book version of “Recognizing and Responding to Students in Distress: A Faculty Handbook.” Originally published by Cornell University, this handbook has been adapted for Virginia campuses and is available for free on its website at www.campussuicidepreventionva.org. Utilizing a public health approach, the Suicide Prevention Center promotes safety and wellness within public and private campus communities across the Commonwealth. Its purpose is to build the infrastructure necessary to promote mental health for all students, support those students identified with mental health concerns, and effectively respond to individuals at risk of suicide. Its guiding principles are:

- Behavioral health is essential to health
- Prevention works
- People recover, and
- Treatment is effective

The faculty handbook provides clear guidance on how to identify not only those students that may be at risk of suicide, but also those that may be a danger to others. It sets out lists of academic, behavioral and emotional, and physical indicators that should alert faculty members that a student may need assistance. Often, simple concerns may be expressed by the student’s peers, or the faculty member may have a hunch or gut level reaction that something may be wrong. If a student is demonstrating safety risk indicators, the student may pose an immediate danger to himself or others. These indicators include:

- Making written or verbal statements that mention despair, suicide or death
- Severe hopelessness, depression, isolation and withdrawal
- Statements to the effect that the student is “going away for a long time”

In such situations, the faculty member should stay with the student and seek immediate help. The situation is an emergency if the physical or verbal expression is directed at self, others, animals or property; the student is unresponsive to the external environment, including being incoherent, disconnected from reality or exhibiting psychosis, or the situation feels threatening or dangerous.

The handbook then provides steps faculty can take to address their concerns in non-emergency situations either directly with the student, especially if the faculty member has a relationship or rapport with the student, or utilizing campus resources. Resources include the university’s academic advising, student services or counseling staff, a colleague, the department

chair or dean, or the threat assessment team. Following the tragedy at Virginia Tech, the Virginia General Assembly enacted Virginia Code § 23-9.2:10 requiring all public colleges and universities to develop policies and procedures for prevention of violence on campus and to establish a threat assessment team. The purpose of the team is to prevent violence by assessing students whose behavior may pose a threat, identifying the appropriate means of intervention with each student and taking sufficient action to resolve the potential threat. The handbook also provides a clear walkthrough of the legal requirements of FERPA with its emphasis on student privacy, which tends to pose a stumbling block to faculty.

Personal Knowledge and Experience

FERPA was enacted by Congress to protect students' privacy by requiring parents or eligible students, that is, students over the age of 18 or enrolled in a postsecondary educational institution, to provide educational agencies and institutions with written consent before their personally identifiable information may be disclosed from their education record. 34 CFR § 99.30. The term "education records" is broadly defined to mean records "(1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR § 99.3.

FERPA, however, only governs disclosure of information contained in a student's education record, not information based on a faculty member's personal knowledge and impressions about a student. A faculty member may therefore share information or concerns based on that faculty member's personal knowledge or observations of the student that is not based on information obtained from an education record. Faculty members may discuss their concerns with a colleague to test their validity or share them with a parent, department head, academic advisor or counselor, or law enforcement officer. Please note that this general rule does not apply to school officials who learn of information about a student in their official role in making determinations about a student, such as disciplinary actions, and that determination is maintained in the student's education record. Faculty should, of course, be discreet in limiting their disclosure to individuals who may be of assistance to the student or may assist the faculty member in interactions with the student, but they should feel free to do so without fear of violating FERPA.

School Officials with Legitimate Interest

A number of exceptions to the requirement that the parent or eligible student provide written consent prior to the disclosure of information from the education record itself also exist. 34 CFR § 99.31. An educational agency may, first of all, disclose information to other school officials within the institution when the institution has determined that the school official has a legitimate educational interest in knowing the information. The term "school official" includes teachers. The educational institution may therefore disclose information to the faculty member from the student's education record if necessary to enable the faculty member to intervene with the student. 34 CFR § 99.31(a)(1)(i)(A). In such a situation, the faculty member may not re-disclose that information further without the student's consent or in accordance with FERPA exceptions.

Health and Safety Emergency

Information from a student's education record may also be disclosed to appropriate individuals, including the student's parents, in an emergency if the information is necessary to protect the health or safety of the student or others. 34 CFR §§ 99.31(a)(10) and 99.36. In addition to the student's parents, appropriate individuals include law enforcement officers, public health officials and trained medical staff. Before disclosing the information, the school official must determine, based on the totality of the circumstances, that an articulable and significant threat to the health and safety of the student or others exists. This exception is limited to the period of the emergency and the information needed to address the emergency. Within a reasonable period of time after a disclosure is made, the educational agency must record in the student's record the articulable and significant threat that formed the basis for the disclosure and to whom the information was disclosed. 34 CFR § 99.32(a)(5).

Law Enforcement Units

Many colleges and universities maintain their own law enforcement units composed of commissioned police officers or non-commissioned security guards to enforce local, state or federal law, or to refer matters to outside law enforcement agencies for enforcement. Other post-secondary educational agencies contract with outside law enforcement agencies or private security agencies for this service. Employees of law enforcement units and contractors are considered school officials to whom information from students' education records may be made if the school has determined that the employee has a legitimate educational interest in obtaining the information.

If the law enforcement or security function has been outsourced, the law enforcement agency must 1) perform a service or function for which the agency or institution would otherwise use employees; 2) must be under the direct control of the agency or institution with respect to the use and maintenance of education records; and 3) must be subject to the FERPA requirements governing the use and re-disclosure of personally identifiable information from education records in order for the contractor, consultant, or volunteer law enforcement officer to be considered a school official. 34 CFR § 99.31(a). The law enforcement unit does not lose its character as a law enforcement unit if it also performs other non-law enforcement activities, such as conducting investigations leading to disciplinary actions or proceedings against students. 34 CFR § 99.8(b)(1).

Law enforcement unit records are excluded from the definition of "education record" and schools are therefore not required to comply with the privacy requirements of FERPA before disclosing them. Law enforcement unit records are defined as those "records, files, documents, and other materials that are – (i) Created by a law enforcement unit; (ii) Created for a law enforcement purpose; and (iii) Maintained by the law enforcement unit." 34 CFR § 99.8(b)(1). Schools may therefore disclose information contained in law enforcement unit records without consent from parents or eligible students.

Excluded from this definition are records created by a law enforcement unit but maintained by a component of the educational agency other than the law enforcement unit, and

records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding. Education records also do not lose their status as education records, however, if they are provided to and contained in law enforcement unit records and the disclosure provisions of FERPA apply. 34 CFR § 99.8. Law enforcement units should therefore maintain law enforcement records separately from education records to which they have access, such as when their members sit on threat assessment teams.

Schools may therefore disclose information concerning students from separately maintained records in their own law enforcement unit to other law enforcement agencies, health care providers, parents or faculty provided the above requirements are followed. Before doing so, schools should consult with their attorney to endure no state law prohibits disclosure.

Disclosures to Parents

Parents have the right to inspect and review their children's education records when their children are under 18 years of age. 34 CFR § 99.10. That right transfers to the student when the student becomes 18 years of age or enrolls in a postsecondary educational institution, if under the age of 18. 34 CFR § 99.5(a)(1). Once the right to inspect or review their child's education record transfers to their child, parents may have access only with the consent of their child unless:

- The student is a dependent for income tax purposes (34 CFR § 99.31(a)(8))
- A health or safety emergency exists (34 CFR § 99.31(a)(10))
- The student is under the age of 21 and has violated any law or institutional policy concerning the use or possession of alcohol or controlled substances and the institution has determined that the student has committed a disciplinary violation as a result (34 CFR § 99.31(a)(15))
- The information disclosed is based on a school official's, including a teacher's, personal knowledge or observation of the student

Treatment Records

Many colleges and universities provide health and medical services to their students. Treatment records maintained by health care providers outside the postsecondary setting are ordinarily covered by the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations contained in 45 CFR Parts 160 and 164 (HIPAA Privacy Rule). The HIPAA Privacy Rule, however, specifically excludes "education records covered by FERPA." 45 CFR § 160.103. FERPA, on the other hand, specifically excludes medical and psychological records from the definition of "education records." 34 CFR § 99.3.

For a student's health records to be considered "treatment records," the treatment records must be made, maintained or used only by a physician, psychiatrist, psychologist or other health care professional or paraprofessional in connection with the treatment of the student, and may be disclosed only to individuals providing the treatment. 34 CFR § 99.3. These treatment records may, however, be disclosed with the consent of the eligible student or under any one of the exceptions to the consent requirements contained in 34 CFR § 99.31(a), including those

situations described above to school officials, such as teachers and law enforcement units with a legitimate need to know, to parents under the exceptions listed, and in health and safety emergencies. The student, nonetheless, does not possess a right of access to his or her own records, although the school may choose to grant such a right. By contrast, if a postsecondary institution provides health care to nonstudents and bills electronically for these services, the individually identifiable health information of its nonstudents is subject to the HIPAA Privacy Rule. The school may also use or disclose a student's health records for purposes other than the provision of treatment to the student. If it does so, however, the records are then classified as "education records" and all of the FERPA privacy requirements apply.

Conclusion

The Faculty Handbook published by the Campus Suicide Prevention Center of Virginia provides very clear and useful guidance to faculty and school officials in identifying not only students who may be at potential risk of suicide, but who may also be dangerous to others. It also sets out very clear steps faculty may take to either intervene directly with a student or refer him or her to other resources, or both. Finally, FERPA does not prevent faculty members from taking needed action to assist their students in distress.

For a detailed discussion of the interrelationship of FERPA and HIPAA, please refer to the United States Department of Health and Human Services and United States Department of Education's "Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* and the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* to Student Health Records," November 2008, available at:

<http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf> .

A clear explanation of the implications of FERPA and the Higher Education Act of 1965, can also be found in its guidance "Addressing Emergencies on Campus," June 2011, on the Department of Education's website at:

<http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf> .

Additional guidance is also available of the Department of Education's website at <http://www.ed.gov/policy/gen/guid/fpco/index.html> , or by contacting the Family Policy Compliance Office at 202-260-3887.

Recently Decided Cases

US Supreme Court Holds Incompetence of State Prisoner Does Not Suspend Federal Habeas Proceeding

The United States Supreme Court decided on January 8, 2013 in two consolidated capital cases that the incompetence of state prisoners does not suspend federal habeas corpus proceedings under either 18 U.S.C. § 3599 or 18 U.S.C. § 4241, reversing the decisions of the

Ninth and Sixth Circuit Courts of Appeal. *Ryan v. Gonzales*, 568 U.S. ____ (2013), slip opinion available at: http://www.supremecourt.gov/opinions/12pdf/10-930_7k47.pdf. Justice Clarence Thomas wrote the decision for a unanimous court.

An Arizona jury convicted Ernest Valencia Gonzales of felony murder, armed robbery, aggravated assault, first-degree burglary and theft. Gonzales had repeatedly stabbed a husband and his wife in front of their 7-year-old son during a burglary of their home. The husband died but his wife survived after several days of intensive care. The trial court sentenced Gonzales to death on the murder charge and to prison terms on the other charges.

After exhausting his state court remedies, Gonzales filed a petition for writ of habeas corpus in federal district court. Gonzales' appointed counsel filed a motion to stay the petition on the grounds that Gonzales was no longer capable of communicating or assisting his counsel. The Ninth Circuit had previously held in *Rohan v. Woodford*, 334 F.3d 803 (9th Cir. 2003), that 18 U.S.C. § 3599(a)(2), the federal statute guaranteeing state capital prisoner's a right to counsel in federal habeas proceedings required that the petitioner be sufficiently competent when he raises claims that could potentially benefit from his ability to communicate with counsel. If he is not competent, he is entitled to a stay of the proceedings pending his restoration to competency. The Ninth Circuit reasoned that without a stay, the petitioner is denied his right to counsel. Although applying *Rohan*, the district court, nevertheless, denied Gonzales a stay. It determined that the claims he raised were based on the record before the trial court or were resolvable as a matter of law ,and his lack of competence would therefore not affect his counsel's ability to represent him. Gonzales then filed an emergency petition for writ of mandamus in the Ninth Circuit. While his case was pending, the Ninth Circuit decided *Nash v. Ryan*, 581 F.3d 1048 (2009), holding that habeas petitioners have an absolute right to competence on appeal, even though appeals are entirely record-based. The Ninth Circuit thereupon granted Gonzales' writ and entered a stay pending his competency determination. The Supreme Court granted Arizona a writ of *certiorari*.

In the second case, an Ohio jury convicted Sean Carter of aggravated murder, aggravated robbery, and rape, and sentenced him to death for anally raping his adoptive grandmother and stabbing her to death. After exhausting his state court appeals, Carter's attorney filed a federal habeas petition along with a motion requesting a competency determination and a stay of his proceedings. Following several psychiatric evaluations, the district court found Carter incompetent to assist counsel and, applying the Ninth Circuit's test in *Rohan*, finding that Carter's assistance was necessary to develop four of his exhausted state court claims. As a result, the district court then dismissed the habeas petition without prejudice and tolled the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996.

On appeal, the Sixth Circuit recognized that federal habeas petitioners do not have a constitutional right to competence, but found a statutory right to competence under 18 U.S.C. §4241, relying in part on the Supreme Court's decision in *Rees v. Peyton*, 384 U.S. 312 (1966). *Rees* required that a Virginia habeas petitioner awaiting the death penalty who decided to forego any further appeals of his conviction or sentence be competent enough to understand the nature of the proceeding and assist counsel before he could withdraw his habeas petition. The Sixth Circuit then ordered that Carter's petition be stayed indefinitely with respect to any claims that

required his assistance. The Supreme Court granted Ohio's petition for writ of *certiorari* and consolidated the two cases for review.

On review, the Supreme Court noted not only that there is no constitutional right to counsel in habeas proceedings, but there is no due process right at all to collateral review. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). It acknowledged that the statute, 18 U.S.C. § 3599(a)(2), grants federal habeas petitioners on death row the right to federally funded counsel. It also gives district courts the power to authorize investigative, expert and other services. But the Court found the statute does not require district courts to stay proceedings when habeas petitioners are found incompetent. The Court reasoned that the right of a criminal defendant to competence in the original trial flows from the Due Process Clause of the Fourteenth Amendment and not from the Sixth Amendment right to counsel, even though the right to counsel at trial may be compromised if the defendant is not able to communicate with counsel. Review of a state court conviction in a federal habeas proceeding is limited to the record in existence at the time of the state court trial. Given the backward-looking, record-based nature of habeas proceedings, counsel can therefore effectively represent the petitioner regardless of his competence. The Court went on to find that the Ninth Circuit decision in *Rohan* incorrectly relied on *Rees*, a decision which simply dealt with an incompetent capital petitioner's ability to withdraw his petition for *certiorari*.

Also reviewing the Sixth Circuit's conclusion that 18 U.S.C. § 4241 provides a statutory right to competence, the Court found that § 4241 does not even apply to habeas proceedings involving state prisoners. Section 4241 only applies to federal defendants and probationers subject to prosecution by the United States and only to trial proceedings prior to sentencing, or after probation or supervised release. The Court therefore held that neither 18 U.S.C. § 3599 nor § 4241 requires suspension of a capital petitioner's federal habeas proceeding when he has been adjudicated incompetent.

Both Gonzales and Carter also argued that district courts have the equitable power to stay proceedings when they determine habeas petitioners are incompetent. In Gonzales' case, the Supreme Court held that the district court correctly found that all of his claims were record-based or resolvable as a matter of law. The district court did not therefore abuse its discretion in denying the stay. In Carter's case, the district court found that four of his claims could potentially benefit from his assistance. However, the Supreme Court determined that three of the claims were adjudicated in state court post-conviction proceedings and could be reviewed on the record. It found it unclear whether the fourth claim, alleging ineffective assistance of appellate counsel for failing to raise trial counsel's failure to pursue a competency to stand trial issue, required consultation with counsel. The Court nevertheless held that an indefinite stay would be inappropriate under the Antiterrorism and Effective Death Penalty Act whose purpose is to reduce delay in the execution of state and federal criminal sentences. The Court remanded Carter's case with instructions that if the court found the fourth claim would substantially benefit from his assistance, the court must take into account the likelihood that Carter will regain competence in the foreseeable future. If there is no reasonable hope of competence, a stay is inappropriate. In a footnote, the Court acknowledged that its opinion does not implicate the prohibition against execution of a death sentence for a prisoner who is insane.

US Supreme Court Denies Review of Idaho's Abolition of Insanity Defense; Three Justices Dissent

Idaho abolished the insanity defense in 1982 enacting new language providing that a defendant's mental condition shall not be a defense to criminal conduct. In this case, John Joseph Delling was charged with two counts of first degree murder, which were later amended to second degree murder. On motion of his counsel, the court ordered Delling evaluated for competency to stand trial and later committed him for restoration to competency. After nearly a year of commitment, Delling was found competent to proceed. He thereafter entered a "conditional" plea of guilty but asked the trial court to find Idaho's abrogation of the insanity defense unconstitutional on its face and as applied in his case. He argued that the ability of a defendant to raise the issue of insanity with respect to criminal responsibility is mandated under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In addition, he argued that abolition of the insanity defense violates his rights under the Sixth Amendment to present a defense and under the Eighth Amendment to be free from cruel and unusual punishment. The trial court denied these arguments and sentenced Delling to two consecutive life sentences.

On appeal, the Idaho Supreme Court upheld his convictions on the grounds that it had previously upheld the State's abolition of the insanity defense in a long line of cases, and that the United States Supreme Court had declined to review any of those decisions after being presented with an opportunity to do so. Delling argued, however, that those decisions were no longer valid in light of the United States Supreme Court's decision in *Clark v. Arizona*, 548 U.S. 735 (2006), in which the Supreme Court upheld the constitutionality of an Arizona statute that removed the cognitive incapacity element or second prong of the M'Naughten test. In so doing, the Supreme Court stated that it had never held that the Constitution mandates an insanity defense, but it had also never held that the Constitution does not require such a test. It stated that each state has the capacity to define its own crimes and defenses.

On November 26, 2012, the Supreme Court not surprisingly declined to review this case. What was a surprise was three justices dissented. Justice Breyer, joined by Justices Ginsburg and Sotomayor, noted the absurd result reached under Idaho law that permitted a defendant to argue that because of mental illness he lacked the requisite intent or *mens rea* to commit the act, but not defend on the basis that he was operating under a delusion when he committed the act. Under *amicus curiae* briefs filed by the American Psychiatric Association and Criminal Law and Mental Health Law Professors, Justice Breyer wrote that the vast majority of defendants pleading insanity appear to know they are committing the act charged but are operating under a delusion when they are doing so. He would therefore grant a Writ of *Certiorari* on the grounds that a defendant's due process of law under the Fourteenth Amendment may be implicated. *Idaho v. Delling*, 267 P.3d 709 (Ida. 2011), cert. denied, *Delling v. Idaho*, 568 U.S. __ (November 26, 2012). The dissenting opinion is available at:

http://www.supremecourt.gov/orders/courtorders/112612zor_f204.pdf [at pp. 24-26]

Virginia Supreme Court Finds Use of Video Conferencing to Conduct Annual SVP Review Hearing Provides Due Process

In a sexually violent predator's ("SVP") appeal of his recommitment to secure inpatient treatment, the Virginia Supreme Court held on November 1, 2012 that use of a two-way electronic video and audio communication system does not conflict with the respondent's statutory and due process rights, including his right to counsel. *Shellman v. Commonwealth*, ___ Va._, 733 S.E.2d 242 (Nov. 1, 2012, No. 120261), available at: <http://www.courts.state.va.us/opinions/opnscvwp/1120261.pdf>

Reginald Shellman was convicted of aggravated sexual battery in Fairfax County Circuit Court in February 2001. Prior to his scheduled release, the Department of Corrections assessed him as a potential SVP and referred him to the Commitment Review Committee, which subsequently referred him to the Office of the Attorney General for a determination as to whether to seek commitment. Upon petition of the Attorney General and following the requisite hearings, the Fairfax County Circuit Court found Shellman to be a SVP and committed him to the Virginia Center for Behavioral Rehabilitation in Burkeville, Virginia, all in accordance with Chapter 9 of Title 37.2 of the Code of Virginia.

In 2011, the Virginia General Assembly amended Virginia Code § 37.2-910(A) to permit annual assessment reviews to be conducted, "whenever practicable," by means of two-way electronic video and audio communications. As a result, and over the objection of the respondent, the court held Shellman's annual review proceeding by video conference. Present in the courtroom in addition to the judge was counsel for the Commonwealth, respondent's counsel, and respondent's mother. The respondent and the Commonwealth's expert, Mario Dennis, Ph.D., a clinical psychologist and Director of Forensic Services at the Center, appeared by video from the Center. At one point, the video feed was lost at both locations, but the hearing was suspended for a short time while the connection was reestablished. The respondent objected during the hearing and on appeal, arguing that the video conference violated his statutory rights in Virginia Code § 37.2-901 to be represented by counsel, to be present during the hearing, and to present evidence and to cross-examine witnesses. Although he could ask to speak in confidence with his attorney, he also argued that his ability to consult and interact with his counsel during the hearing was stifled, thus violating his due process right to counsel. The record did not reflect, however, that the respondent or his counsel actually indicated they wished to confer at any point during the proceeding.

The Supreme Court first held that there was no statutory violation. The statutes granting the respondent's rights, including the right to counsel, and authorizing the use of video conferencing were both plain on their face, were not clearly ambiguous, and did not conflict with one another. The respondent demonstrated no prejudice in appearing by video conference and the statute permitting its use "whenever practicable" was a matter committed to the court's sound discretion. The respondent's mere objection to the video conference did not render its use "impracticable," and as such, was a matter left to the court's sound discretion.

Turning to the constitutional issue, the Court applied the Fourth Circuit's decision in *United States v. Baker*, 45 F.3d 837 (4th Cir. 1995), in which that Court upheld the use of videoconferencing in the context of competency commitment hearings. The Court found that the goal of both processes is to test the opinions of experts. Whereas in a criminal trial the demeanor of the defendant and witnesses is a major concern, decisions to commit for competency restoration or as an SVP are both based not so much on the demeanor of the witnesses, but on the qualifications of the experts and the substance and thoroughness of their opinions. The Court then found that "the purpose of the annual assessment hearing is to determine whether, in light of the treatment received in the preceding year, the respondent remains a sexually violent predator and, if so, whether there is a less restrictive alternative to secure inpatient treatment." The Court therefore held that the use of video conferencing in this context is neither unconstitutional on its face nor as applied in this case.

Tenth Circuit Finds Right to Counsel in Post-Conviction Proceeding to Determine Whether Mental Retardation Bars Imposition of Death Penalty; Rejects Use of Flynn Effect in Determining IQ

Although there is no right to counsel in post-conviction proceedings, the Tenth Circuit has held that a capital defendant has a Sixth Amendment right to counsel in a post-conviction (*Atkins*) hearing conducted after his original conviction to determine whether he is mentally retarded (intellectually disabled). Such a finding would bar imposition of the death penalty. The Court then proceeded to review each of the defendant's claims of ineffective assistance of counsel, rejecting all of them except one, but finding no cumulative evidence or prejudice on that claim to warrant overturning the jury verdict. On review of the jury's finding that the defendant was not mentally retarded, the Court found that the results of the defendant's numerous IQ tests fell within a "gray" area, but the scores were not entitled to be adjusted downward due to the "Flynn" effect. Because there is no scientific consensus on its validity, failure to apply it is not "contrary to clearly established federal law." Finally, the Court found that defendant's trial counsel in the original trial was grossly ineffective during the sentencing phase, overturned the death sentence, and remanded the case to the Oklahoma courts for a new sentencing hearing. *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012).

Victor Hooks was convicted in 1989 of first degree murder of his common law wife and of first degree manslaughter of her unborn child. Hooks and his common law wife had lived together for four years and were the parents of a one-year-old daughter. His wife was also 24 weeks pregnant with their second child. After originally claiming that she had been beaten and raped while on a walk, Hooks confessed to police that they had been fighting, she slapped him, and he then struck her, knocked her to the ground and kicked her in the stomach and face. Subsequently he removed her clothing, put her in the bathtub, and shaved a portion of her head. Hooks then cleaned up the apartment and also removed blood from his one-year-old daughter who had been splattered in the course of her mother's beating.

Hooks was represented at trial by a private attorney hired by his mother. His attorney decided not to pursue an insanity defense believing there was an insufficient factual basis for it, but focused on obtaining a conviction for a lesser-included offense of second degree murder or

first degree manslaughter, arguing that Hooks acted in the heat of passion and not with malice aforethought. There was some information that Hooks had been hit by an 18-wheel truck as a child and suffered a traumatic brain injury, and also suffered from chronic psychosis. The evidence also showed that Hooks had abused his wife on prior occasions and was convicted of armed robbery of a liquor store several years earlier. The trial court refused to instruct the jury on the lesser included offenses and the jury then found the defendant guilty of first degree murder, imposing the death penalty, and first degree manslaughter in the death of the unborn child, sentencing him to 500 years imprisonment on that charge.

Hooks challenged his convictions both on direct appeal and through post-conviction petitions for writs of habeas corpus. In 2002, 13 years after Hooks' conviction, the United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) that, in light of a national consensus, the execution of a person with mental retardation is cruel and unusual punishment prohibited by the Eighth Amendment. Hooks then filed a second post-conviction petition alleging that he is mentally retarded. In 2004, after a six-day trial, a jury found him not to be mentally retarded. The Oklahoma Court of Criminal Appeals upheld the determination on both direct appeal and collateral review.

In deciding *Atkins*, the Supreme Court declined to establish a definition of mental retardation, but left it to the states to do so. In response to *Atkins*, the Oklahoma Court of Criminal Appeals established the following definition in case law:

A person is "mentally retarded" (1) [i]f he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) [t]he mental retardation manifested itself before the age of eighteen (18); and (3) the [m]ental retardation is accompanied by significant limitations in adaptive functioning in at least two ...skill areas....However, no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test.

Murphy v. State, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002). A defendant has the burden of proving his mental retardation by a preponderance of the evidence.

Hooks had been administered IQ tests through the years and nine of these test results were presented to the jury with scores ranging from 53 to 80. The experts agreed that this range of scores put Hooks in a "gray area." Tests of 70 or below, however, all reflected some degree of lack of cooperation on Hooks' part. The experts agreed that the most reliable scores were those conducted by two of the experts of 72 and 76, neither of which met the 70 or below requirement. Hooks argued that these scores should be adjusted downward to reflect the "Flynn Effect." The "Flynn Effect" is a phenomenon named for James R. Flynn who discovered that the population's mean IQ score rises over time by approximately 0.3 points per year. If an

individual's test score is measured against a mean of a population sample from prior years, then his score will be inflated and will not provide an accurate picture of his IQ.

The Tenth Circuit rejected this argument finding that Oklahoma law does not require an adjustment for the "Flynn Effect," nor did it find any scientific consensus on its validity. The Court held therefore that failure to apply the "Flynn Effect" was not "contrary to or an unreasonable application of clearly established federal law," the standard required to overturn a final state court determination on collateral review. Based upon all of the evidence presented, including other evidence related to Hooks' functional capacity and his adaptive skills, the jury's finding that he was not mentally retarded was not clearly erroneous.

Hooks also claimed that his counsel at his *Atkins* trial was ineffective on a number of legal grounds. The State argued that there is no right to counsel in post-conviction proceedings and therefore there is no basis for a claim of ineffective assistance of counsel in post-conviction *Atkins* hearings. The Tenth Circuit recognized that the United States Supreme Court has never held that there is a Sixth Amendment right to counsel in an *Atkins* hearing. It reasoned, however, that the Sixth Amendment guarantees the right to have counsel present at all critical stages of criminal proceedings. Although Hooks was convicted years before the *Atkins* decision and his trial to determine whether he is mentally retarded was necessarily a post-conviction proceeding, this hearing was the first proceeding at which he could raise this claim. The Court held that the *Atkins* trial is therefore part of the criminal proceeding and is inextricably intertwined with sentencing. It is thus not civil in nature, as post-conviction proceedings normally are. The right to counsel therefore "flows directly from, and is a necessary corollary to the clearly established law of *Atkins*."

The Court then examined Hooks' claims that his counsel was ineffective on the merits. Hooks argued that the standard articulated in *United States v. Cronic*, 466 U.S. 648 (1984), where counsel's representation fell so far short of that expected of defense counsel that prejudice was presumed, should be applied in his case. In *Cronic*, the Supreme Court found that some actions of counsel are so likely to prejudice the defendant that the cost of litigating their effect is unjustified and prejudice will be presumed. The Court found, however, that his counsel actively and zealously participated in all phases of the proceedings and therefore held that the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), applied instead. In *Strickland*, a review of counsel's performance is a highly deferential one and counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Although counsel failed in one aspect of representation, the Court found that failure was not cumulative or prejudicial to the hearing's outcome.

The Court next reviewed the effectiveness of counsel at his original trial and found that Hooks' counsel at trial in the conviction phase exercised a tactical decision not to raise an insanity defense because it lacked a factual basis. In the sentencing phase, however, the Court found counsel's representation grossly deficient in his failure to conduct a thorough investigation or to produce any evidence in mitigation. He failed to challenge the prosecution's aggravation evidence or to present evidence that revealed Hooks was raised in an abusive and chaotic family, suffered from a brain injury and suffered from chronic psychotic mental health problems, all of which could have elicited sympathy from a juror and mitigated his sentence. Moreover, counsel

made his own statements to the jury related to Hooks' violent tendencies and permitted his own expert to make prejudicial statements related to his violence. The Court therefore vacated the death sentence and remanded the case to the Oklahoma courts for a new sentencing hearing.

Defendant Detained in Mental Health Facility for Restoration to Competency is Prisoner under Prison Litigation Reform Act

The Second Circuit Court of Appeals has upheld the district court's dismissal of a petitioner's motion to proceed *in forma pauperis*, resulting in dismissal of his complaint against a number of city, corrections and mental health officials alleging they violated his civil rights. The petitioner had filed three previous petitions as a prisoner that had been dismissed as frivolous, malicious, or failed to state a claim upon which relief may be granted. The Court held that although the petitioner was being detained in a mental health facility, he was still a "prisoner" for purposes of the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g), and thus subject to the Act's limitation on proceeding *in forma pauperis* in federal court. *Gibson v. City Municipality of New York*, 692 F.3d 198 (2012).

The petitioner, Bennie Gibson, had been charged with third degree criminal mischief under New York law and was being detained at Kirby Psychiatric Center in the custody of the Commissioner of Mental Health on a temporary order of observation for restoration of his capacity to stand trial. While federal law generally permits a district court to waive filing fees for individuals who cannot pay and to proceed *in forma pauperis*, Congress enacted the Prison Reform Litigation Act in 1995 to limit abuse of the legal system by prisoners who file repetitive frivolous complaints. "Prisoner" is defined under the Act as "any person...detained in any facility who is accused of...violations of criminal law." 28 U.S.C. § 1915(h). Under New York law, criminal charges are not dismissed against a defendant held in the temporary custody of the Commissioner of Mental Health, but are merely suspended pending his treatment and restoration to capacity. Gibson therefore met the definition of a prisoner as a person detained as a result of an accusation, conviction, or sentence for a criminal offense. Had Gibson been held under a final order of observation as a civil unrestorable patient, been found not guilty by reason of insanity, or been civilly committed as a sexually violent predator, the result may not have been the same.

Iowa Supreme Court Finds Due Process Does Not Require Jury Instruction on Consequences of Insanity Verdict

The Iowa Supreme Court has held that the jury instructions given by the trial court in this case, when read as a whole, fairly and accurately described the insanity defense under Iowa law. Due process did not require the court to instruct the jury on the consequences of an insanity verdict even when the jury requested such information. *Iowa v. Becker*, 818 N.W.2d 135 (Iowa 2012).

The defendant Mark Becker shot and killed his former football coach in a high school weight room on June 24, 2009 in front of numerous high school students and was charged with first degree murder. His mother testified that he was an active and friendly child until the end of

his freshman year in high school when he started to withdraw a little. After attending one semester of college, Becker dropped out and became more inward, depressed and very uncommunicative. In September 2008, he began a series of escalating violent episodes, including assaulting his mother. These episodes resulted in several week-long psychiatric commitments and the prescription of medication that he would take sporadically.

Four days before the shooting, Becker knocked on the door of a residence, and when he was not admitted, he smashed the storm door, a picture window and a garage window with a baseball bat, and tried to drive his car through the garage door. Becker was arrested, booked and then sent to a psychiatric unit for evaluation. The following day he was diagnosed with paranoid schizophrenia and given medications. Two days later he requested release, and appearing to the psychiatric unit to be better, it released him without notifying the sheriff. The local mental health services coordinator assisted him in opening his apartment because the police still had his keys and made plans to fill his prescriptions the next day. However, Becker called his parents and spent the night at their home.

Becker arose at 4:30 a.m., and had coffee with his parents later that morning before they left for work. He then pried open the gun cabinet in his parents' basement, removed a .22 caliber revolver and practiced shooting at a birdhouse in the yard. Becker then drove to a house in a neighboring town looking for his former coach. When told the coach did not live there, he returned to his town, asking people where he could find the coach, and saying he was working with the coach on a tornado relief project. He was told the coach might be teaching driver education at the local elementary school. Becker then drove to the elementary school and upon arrival asked the custodian where he might find the coach. Since the high school had been damaged by a tornado, a temporary weight room had been set up in the nearby elementary school. When told that was where he might find the coach, he drove around to the weight room, but left the gun in the car. Upon determining that the coach was there, he returned to the car, put the gun in his coveralls, later explaining the coveralls would hide the gun, and reentered the weight room. He then shot the coach six times in the head, chest and leg, and proceeded to kick and stomp him. He then left the weight room screaming that he had killed Satan. Becker then drove to his parents' home where he was arrested and charged with first degree murder.

At trial, Becker raised the insanity defense. Two psychiatrists testified that he suffered from paranoid schizophrenia and, as a result, was unable to understand the nature or consequences of his actions and was incapable of distinguishing right from wrong. The prosecution called two psychiatrists in rebuttal who agreed he was paranoid schizophrenic but that he understood the nature and consequences of his action and knew right from wrong. The jury deliberated for several days and sent several questions to the court including what would happen if Becker were found not-guilty-by-reason-of-insanity. The court referred the jury to Instruction 10 that informed them that in the case of a guilty verdict, they would have nothing to do with punishment. In response to the question, the court also informed the jury that in the event of either a guilty verdict or a not-guilty-by-reason-of-insanity verdict, they would have nothing to do with the consequences and these were issues for the court, not the jury. The jury then returned a verdict of guilty and the court sentenced Becker to life in prison without parole.

Becker appealed his conviction on the grounds that the jury instructions did not accurately define the elements of the insanity defense and that the court violated his due process rights under the Iowa constitution when it refused to instruct the jury on the consequences of a not-guilty-by-reason-of-insanity-verdict.

Under Iowa law, a defendant may be found not-guilty-by-reason-of-insanity if he shows that a diseased or deranged condition of the mind rendered him incapable of knowing the nature and quality of the act he is committing or incapable of distinguishing between right and wrong in relation to that act. It has no irresistible impulse prong. The Iowa Supreme Court found that although a defendant is ordinarily entitled to have his instructions presented to the jury and his instruction in the case stated the law more coherently and concisely, courts' instructions are not required to contain the precise language of the applicable statute. The trial court's instructions to the jury substantially mirrored the Iowa State Bar's uniform jury instructions. When read with the other instructions given, the court's instruction accurately and completely stated the applicable law. The Supreme Court held that the defendant was therefore not entitled to have his instruction submitted to the jury.

After reviewing its extensive precedent, the Iowa Supreme Court also found that the trial court did not violate the defendant's due process rights under the Iowa Constitution for refusing to instruct the jury regarding the consequences of a not-guilty-by-reason-of-insanity verdict. It wrote that the United States Supreme Court has held that federal courts are not required to give an instruction explaining the consequences of a not-guilty-by-reason-of-insanity verdict under the Insanity Defense Reform Act, *Shannon v. United States*, 512 U.S. 573 (1994), but the Supreme Court has not decided the issue on constitutional grounds. The Iowa Court noted that a majority of states refuse to require the instruction, but there is a split of authority on the issue. A number of states have adopted the *Lyles* Rule that originates from *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), an early case requiring the instruction in the District of Columbia. The rationale for the *Lyles* Rule recognizes that jurors are aware of the results of guilty and not guilty verdicts, but a verdict of insanity does not have a commonly understood meaning. Arguments against the *Lyles* Rule include, first that such information is irrelevant to the jury's proper function, which is the determination of the sanity issue, and second, that the information would invite a compromise verdict.

The Iowa Supreme Court also noted that 24 states require a consequence instruction even though the due process clause is not used to justify the requirement. About one-third of these states have specific statutes requiring the instruction. A slight majority of the states, such as Virginia, do not require a consequence instruction, or allow the instruction only when the consequences of a not-guilty-by-reason-of-insanity verdict are inaccurately portrayed to the jury by a prosecutor or defense counsel. See *Kitze v. Commonwealth*, 435 S.E.2d 583, 586 (Va. 1993); *Spruill v. Commonwealth*, 271 S.E.2d 419, 426 (Va. 1993).

The Iowa Supreme Court also recognized that many commentators, researchers, academics and law students believe that the best practice is to give the instruction whenever requested by the defendant. One commentator in particular wrote that "the public overestimates the extent to which insanity acquittees are released upon acquittal and underestimates the extent to which they are hospitalized as well as the length of confinement of insanity acquittees who are

sent to mental hospitals.” Eric Silver et al., Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 *Law & Hum. Behav.* 63, 68 (Feb. 1994). The Court found that while there may be policy reasons supporting a consequence instruction, the law and the Iowa Constitution does not require it, and policy decisions are best left to the legislature and not the courts.

The Iowa Supreme Court therefore found that fundamental fairness does not require a trial court to instruct the jury that if it finds the defendant to be not-guilty-by-reason-of-insanity, he would be committed to a mental health facility for evaluation. The Court went on to state, however, that this decision should not be read as an absolute prohibition on giving a consequences instruction.

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