Winter 2012

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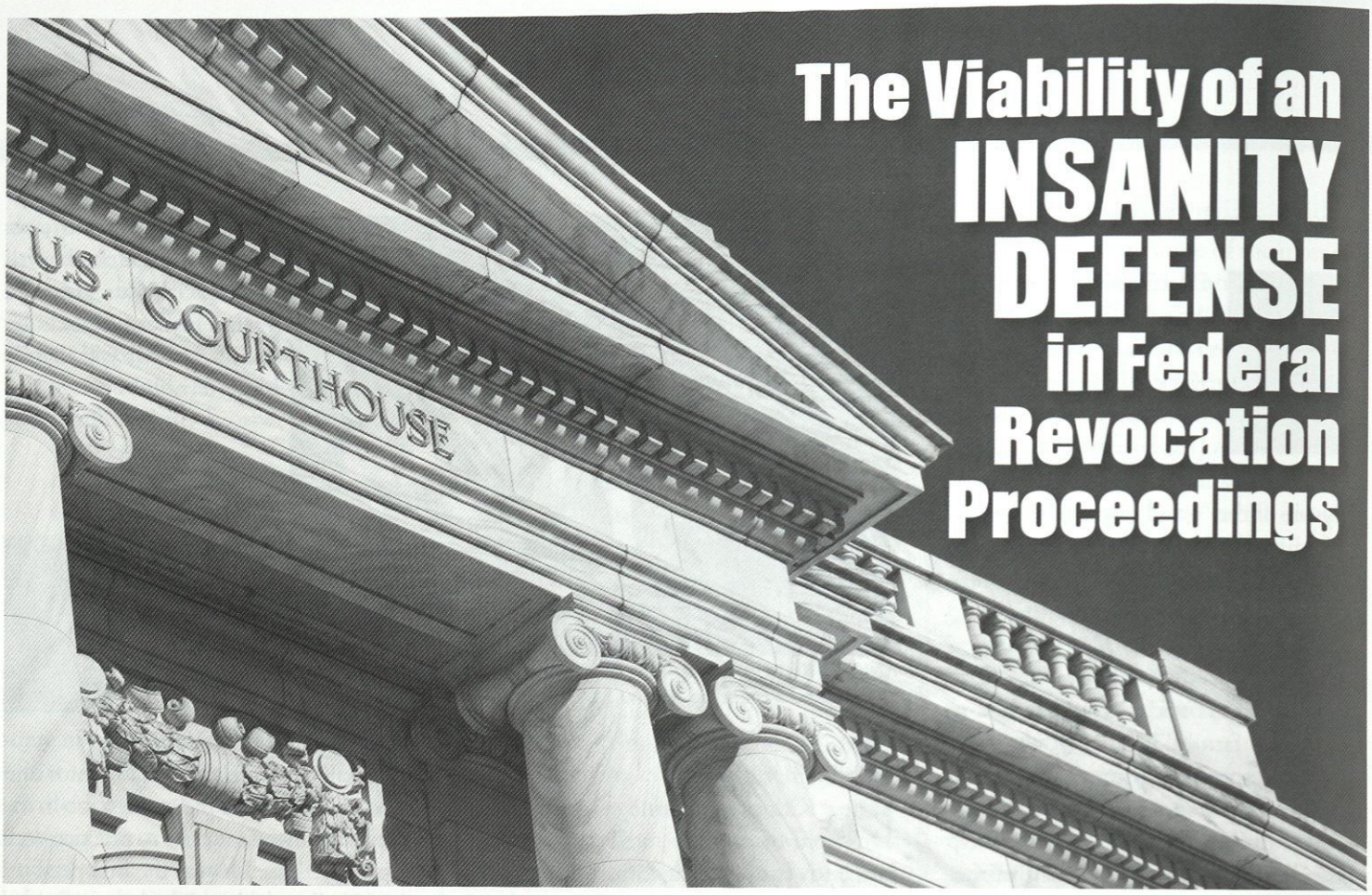

The Viability of an INSANITY DEFENSE in Federal Revocation Proceedings

by Donna L. Eng

It's not an uncommon scenario: your client, who suffers from mental health issues, was given a probationary sentence. While on probation, your client stops taking his medication and has a mental breakdown in a public location. The police are called, and instead of just being involuntarily committed pursuant to the Baker Act,[1] your client is also charged with violating the terms of his probation as a result of his interactions with the officers on scene.

FLORIDA JURISPRUDENCE

If you've practiced in State court for any period of time, you're probably aware that insanity is a recognized defense at trial, as well as in violation of probation proceedings.[2] In fact, several courts have held that mental illness can render violations of probation not willful.[3] Failing to raise the defense of insanity during violation of probation proceedings has even been held to constitute ineffective assistance of counsel.[4]

However, if your client is serving a Federal supervised release sentence when he or she suffers the same mental breakdown, insanity may not be a viable defense in any subsequent violation proceedings.

FEDERAL JURISPRUDENCE

In *Knight v. Estelle*, 501 F.2d 963, 963-965 (5th Cir. 1974), cert. denied 421 U.S. 1000 (1975), Knight was convicted in the State of Texas for raping an eleven year old girl, and sentenced to life imprisonment. While on parole, he committed another sexual offense against a 12-year-old girl, and fled the state. He was subsequently arrested and his parole revoked. At the trial for the second sexual offense, the jury found Knight to be legally insane at the time of the event and incompetent to stand trial. On appeal to the Fifth Circuit, Knight argued that his parole could not be constitutionally terminated for events committed while he was insane. The Fifth Circuit disagreed.

In its rationale, recalling that a parole revocation hearing is not a criminal proceeding, the Court observed,

> ...Its purpose is not to assess guilt or to assign blameworthy acts to the various discrete pigeonholes of the criminal laws. Rather it is held to determine whether the attempt by parole to restore the parolee to the ranks of the carriers and remove him from those of the carried has failed. At this stage of matters, the interests of society and its safety must be first consulted, since — to take Knight for an example — it little matters to his prospective rape victim

what *mens rea*, if any, is to accompany the act. To her, it is the same whether she is brutalized by one who does so from choice or because he cannot help it. And in either case, if the parolee has committed the physical act, the attempt to reintegrate him into society has obviously failed and the present effort to do so must be abandoned in favor of a more stringent form ofncustody. Whether the act which made the failure apparent was culpable or punishable is no concern of the revocation authority which does not sit to punish. Its concern is whether the law has been obeyed, not whether it has been culpably broken. And thus it is that the same act at variance with the law may, for a variety of reasons, be the occasion of both a successful criminal defense and a parole revocation. At any rate, since the defense of insanity does not concern whether the act was committed or not, but only whether it was volitional and therefore culpable, and since parole revocation need only consider whether or not the act was committed, it follows that parole may, consistently with fundamental fairness, be revoked for acts committed while the parolee is insane.

Knight, 501 F.2d at 964-965 (footnotes omitted).

The Court went on to hold that the new crime, in all its elements, including *mens rea*, need not be proven prior to revocation. See *Id.* at 965.

Nine years later, in *Bearden v. Georgia*, 461 U.S. 660, 661 (1983), the United States Supreme Court considered the issue of whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution. Ultimately, the Court held that the sentencing court erred in automatically revoking Bearden's probation for failure to pay the fine, where the court failed to determine that Bearden had made sufficient bona fide efforts to pay, or that adequate alternative forms of punishment did not exist. See *Bearden*, 461 U.S. at 661-662.

Although one might argue that *Bearden* precludes a court from revoking supervised release where the charged act was not committed willfully, a close read of *Bearden* shows that the Court's holding was not so broad. In fact, the Court specifically cautioned,

> We do not suggest that, in other contexts, the probationer's lack of fault in violating a term of probation would necessarily prevent a court from revoking probation. For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed. Cf. *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Ultimately, it must be remembered that the sentence was not imposed for a circumstance beyond the probationer's control but because he had committed a crime. *Williams v. Illinois*, [399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)]. In contrast to a condition like chronic drunken driving, however, the condition at issue here-indigency-is itself no threat to the safety or welfare of society.

Bearden, 461 U.S. at 668 n. 9.

This principle has served as the basis for various Federal decisions holding that supervised release can be revoked for acts allegedly committed while a defendant is insane or otherwise lacks the specific intent to commit a criminal offense. For example, in *United States v. Brown*, 899 F.2d 189, 194-195 (2d Cir. 1990), the Second Circuit affirmed *Brown*'s revocation of probation notwithstanding the fact that he labored under a cocaine psychosis during the time of his probation violations. In *United States v. Gallo*, 20 F.3d 7, 15 (1st Cir. 1994), the First Circuit affirmed *Gallo*'s revocation of probation after he refused to submit to inpatient hospitalization for mental health treatment. In rejecting Gallo's contention that he was being punished for faultless conduct, the Court cited Bearden and Brown for the proposition that although a probation violation may result in incarceration ... the punishment is imposed not for the violation itself, but for the prior criminal offense for which the probationer was convicted. *Gallo*, 20 F.3d at 14-15 (citing *Bearden*, 461 U.S. at 668 n.9, and Brown, 899 F.2d at 193).

In *United States v. Clarkson*, 208 F.3d 218, 2000 WL 227908, *1 (8th Cir. 2000) (unpub.), Clarkson was sentenced to imprisonment followed by a term of supervised release. After stopping his mental health medication, which was required by the terms of his release, Clarkson began to fear that his probation officer was going to kill him. See *Clarkson*, 2000 WL 227908 at *1. After fleeing the jurisdiction, Clarkson was eventually arrested and his supervised release revoked. See *Id.* Although Clarkson argued on appeal that his supervised release should not have been revoked because his behavior was driven by delusions, not criminal intent, the Court disagreed, and noted that probation may be revoked whenever a defendant fails to comply with the terms of his release, regardless of whether the failure to comply is the result of willfulness, carelessness, or impaired mental capacity. See *Clarkson*, 2000 WL 227908 at 1 (citing *Brown*, 899 F. 2d at 193; *Bearden*, 461 U.S. at 668 n.9; and *Gallo*, 20 F.3d at 14-15).[5]

However, not all courts have blindly followed *Bearden*, *Brown* and *Gallo*. In *United States v. McNair*, 588 F. Supp. 2d 1288 (M.D. Ala. 2008), the United States District Court for the Middle District of Alabama questioned other courts' refusals to consider the defense

of insanity during Federal revocation proceedings. McNair, who suffered from mental illness and substance abuse problems, was charged with domestic violence under Alabama law while on supervised release for Federal drug charges. See *McNair*, 588 F. Supp. 2d at 1289. After conducting multiple revocation hearings, and delaying the matter several times because of competency issues, the District Court ruled that McNair should be found not guilty of the state law offense charged in the revocation petition, and that his supervised release should be modified to require further mental health treatment. See *Id.* at 1289, 1294-1295.

In its rationale, the District Court noted that Federal revocation proceedings typically consist of two components: 1) a retrospective factual question whether the probationer has violated a condition of probation; and 2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation. *Id.* at 1291 (quoting *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985)). As the District Court noted, generally, under such analytical framework, questions of culpability and voluntariness only enter the calculus at the second stage. See *Id.* at 1292. However, in McNair's case, because Alabama state law provided that McNair should be found not guilty if he was determined to be insane, his sanity became a critical in the first stage, the retrospective factual issue of whether a condition was violated ... and *not* as a defense once the elements of a supervised release violation have already been established. *McNair*, 588 F. Supp.2d at 1293 (citing *Romano*, 471 U.S. at 611, 105 S.Ct. 2254) (emphasis in original). Ultimately, the District Court determined that McNair was not guilty of the Alabama offense by reason of insanity, and ordered continued mental health treatment for McNair. See *Id.* at 1294. The *McNair* decision does not appear to have been appealed to the Eleventh Circuit.

THE ELEVENTH CIRCUIT

Surprisingly, a diligent search of Eleventh Circuit jurisprudence has not revealed any cases addressing the insanity defense in Federal revocation proceedings. However, caselaw in other contexts suggests that the Eleventh Circuit would likely take a dim view of the insanity defense in revocation proceedings.

Under the Insanity Defense Reform Act of 1984, 18 U.S.C. §17, all affirmative defenses or excuses based upon mental disease or defect, other than insanity, were eliminated. See *United States v. Westcott*, 83 F.3d 1354, 1357-58 (11th Cir. 1996), cert. denied, 519 U.S. 908, 117 S.Ct. 269, 136 L.Ed.2d 193 (1996). The Eleventh Circuit has also held that a diminished capacity defense is not available when a person is charged with a general intent crime. See *United States v. Ettinger*, 344 F. 3d 1149, 1161 (11th Cir. 2003).

In 1990, the Eleventh Circuit observed that the Insanity Defense Reform Act preclude[s] ... the use of non-insanity psychiatric evidence that points toward exoneration or mitigation of an offense because of a defendant's supposed psychiatric compulsion or inability or failure to engage in normal reflection. *United States v. Cameron*, 907 F.2d 1051, 1066 (11th Cir. 1990). In discussing diminished capacity defenses in federal criminal proceedings, the Eleventh Circuit observed,

> Only in the rare case, however, will even a legally insane defendant actually lack the requisite mens rea purely because of mental defect. [*United States v. Pohlot*, 827 F.2d 889, 900 (3d Cir. 1987)]. See Arenella, "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage,' 77 *Columbia Law Review*, 827, 834 (1977). When a defendant claims to have psychiatric evidence that she lacked the capacity or was incapable of forming the intent necessary for the crime charged, most often that defendant is speaking of an incapacity to reflect or control the behaviors that produced the criminal conduct. Such evidence is not psychiatric evidence to negate specific intent and should not be admitted. Otherwise, the insanity defense [will be] improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a diminished responsibility or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.

Cameron, 907 F. 2d at 1066-1067 (quoting S. Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), Reprinted in 1984 *U.S. Code Congressional and Administrative News*, 3182, 3411).

WHAT ARE YOUR OPTIONS?

Admittedly, the foregoing discussion is not very encouraging. What are your options if your client is charged with a Federal violation of supervised release, and mental health or insanity issues are involved?

Your first option may be to contact your client's supervised release officer as soon as you suspect that mental health issues are at play, preferably before a violation petition is filed. If the supervised release officer is sympathetic, perhaps he or she could be persuaded to petition the court to modify the conditions of supervised release so as to include mental health treatment, or to modify the mental health treatment conditions that have already been imposed.

Second, if a petition for violation has already been filed, your client could admit the violation, and you could offer expert evidence of insanity or diminished capacity as mitigation, or in support of a request to obtain mental health treatment as part of sentencing.[6]

Third, if a petition for violation has already been filed, and your client is charged with a Florida state law violation, your client could contest the allegations,

and you could argue, based on McNair, 588 F. Supp. 2d 1288, that Florida's insanity defense should be considered during the first stage of the proceedings, as part of the calculus to determine whether any conditions of supervised release had been violated. However, if your attempt to have the District Court accept the insanity defense fails, it appears, based on Eleventh Circuit jurisprudence, that so long as the violation proceedings afforded your client adequate due process, the likelihood of success on any appeal would be low.[7]

[1] See §394.467, Fla. Stat. (Involuntary Inpatient Placement).

[2] See Florida Rules of Criminal Procedure, 3.216 (Insanity at Time of Offense or Probation or Community Control Violation; Notice and Appointment of Experts); 3.217 (Judgment of Not Guilty by Reason of Insanity; Disposition of Defendant); and, 3.218 (Commitment of a Defendant Found Not Guilty by Reason of Insanity). See also *Tillman v. State*, 407 So. 2d 261, 262 (Fla. 3d DCA 1981) (recognizing defense of insanity in violation of probation proceedings; finding that the trial court was correct in rejecting the defense); *Williams v. State*, 728 So. 2d 287, 287-288 (Fla. 2d DCA 1999) (reversing revocation of probation because the evidence of Williams' severe depression rendered the violations of probation neither willful nor substantial).

[3] See *Marcano v. State*, 814 So. 2d 1174, 1177 (Fla. 4th DCA 2002) (noting that mental illness can render violations of probation not willful and substantial); *Williams*, 728 So. 2d at 287-288 (reversing revocation of probation because the evidence of Williams' severe depression rendered the violations of probation neither willful nor substantial); *Robinson v. State*, 744 So. 2d 1188, 1189 (Fla. 2d DCA 1999) (noting that mental illness can render violations of probation not willful and substantial.) (citation omitted).

[4] See *Phelps v. State*, 911 So. 2d 186, 186 (Fla. 1st DCA 2005) (Defense counsel's failure to offer evidence of appellant's incompetence to support a finding that the appellant had not willfully and substantially violated his probation at a violation of probation proceeding can amount to ineffective assistance of counsel.) (citing *Medrano v. State*, 892 So. 2d 508 (Fla. 3d DCA 2004).

[5] See also *United States v. Pinjuv*, 218 F.3d 1125, 1130-1131 (9th Cir. 2000) (affirming revocation of supervised release and sentence of incarceration despite extensive mental health issues).

[6] See *Brown*, 899 F.2d at 194 (describing two-step process where lack of voluntariness may be considered by the Court in fashioning an appropriate disposition in light of the needs to rehabilitate the probationer and to protect society; further noting that if, during a period of incarceration, the defendant continues to believe that he or she suffers from a mental health issues, he or she can petition the Government to move for a hearing to determine the state of his present mental condition and to ascertain whether he should be transferred to a suitable treatment facility. (citing 18 U.S.C. §4245(a)).

[7] See *Brown*, 899 F.2d at 194-195 (reasoning that the probation proceedings afforded *Brown* due process because, 1) at the preliminary hearing, the Government established probable cause to find that Brown committed the violation; and, 2) at the final hearing, although the court rejected the insanity defense, the court nevertheless considered Brown's evidence of mitigation).

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