

principles and processes (e.g., *voir dire*, direct and cross examination, opening and closing arguments) that are usually not assessed in a standard competency evaluation. However, in light of the *Barnes* decision, trial courts may reject the relevance of testimony related to trial ability deficits not generally assessed during standard competency evaluations.

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## Standard for the Denial of an Inmate's Certificate of Appealability and Funding for Investigative and Expert Assistance in an Ineffective Assistance of Counsel Claim

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### **A Certificate of Appealability Requires That an Inmate Make a Substantial Showing of the Denial of a Constitutional Right; Funding for Investigative and Expert Assistance in an Effective Assistance of Counsel Claim Requires a Showing of Both Ineffective Habeas Counsel and a Substantial Ineffective Assistance of Counsel Claim**

In *Crutsinger v. Stephens*, 540 F. App'x 310 (5th Cir, 2013), the Fifth Circuit Court of Appeals denied an inmate's request for a certificate of appealability (COA) with regard to his ineffective assistance of counsel (IAC) claim. The IAC claim alleged that counsel failed to investigate "red flags" about his social history in a forensic psychologist's report. The court also upheld the district court's denial of funding for expert assistance in developing the IAC claim.

#### *Facts of the Case*

On April 6, 2003, Billy Jack Crutsinger stabbed and killed Pearl Magouirk, age 89, and her daughter, Patricia Syren, age 71. His defense counsel asked for a mitigation specialist to investigate Mr. Crutsinger's social history. The court appointed Dr. Kelly Good-

ness, a forensic psychologist, to complete the evaluation. Dr. Goodness interviewed Mr. Crutsinger for 14 hours, reviewed records, and administered 19 different psychological instruments. Her team interviewed his family and friends. She consulted with his attorneys and then issued a 23-page report. Mr. Crutsinger's counsel decided not to present Dr. Goodness' testimony.

A Tarrant County, Texas jury found Mr. Crutsinger guilty of capital murder. The trial judge sentenced him to death. His verdict and sentence were both upheld on direct appeal, and his application to the Supreme Court for a writ of *certiorari* was denied.

Although his case was pending on direct appeal, Mr. Crutsinger applied for state *habeas corpus*. In 2007, the Texas Court of Criminal Appeals denied relief.

In 2008, Mr. Crutsinger sought funding for "investigative and expert assistance in the development of his claim that his trial counsel was ineffective in failing to timely initiate a social history investigation" (*Crutsinger*, p 312). The district court found that his IAC claim was not exhausted and therefore declined to review the state court's denial of funding.

Mr. Crutsinger filed for federal *habeas* relief alleging that his "trial counsel provided ineffective assistance in failing to timely initiate a social history evaluation, which caused counsel to overlook evidence of his mental impairments caused by alcohol addiction, head trauma, depression and low intelligence" (*Crutsinger*, p 312). The government argued that Mr. Crutsinger was not able to show that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's deficient performance. The court rejected his IAC claim, denied his *habeas* petition, and denied his COA.

Mr. Crutsinger then petitioned the United States Court of Appeals for the Fifth Circuit for a COA in his case.

#### *Ruling and Reasoning*

After the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, defendants could not file appeals on denials of *habeas* relief without first securing a COA. This required a "substantial showing of the denial of a constitutional right" (*Crutsinger*, p 313). The petitioner would have to show that reasonable jurists could disagree with a district court's denial of his *habeas* petition or that "reasonable jurists

could conclude that the issues are adequate to deserve encouragement to proceed further” (*Miller-El v. Cockrell*, 537 U.S. 322 (2003), p 327).

Mr. Crutsinger requested a COA because he claimed trial counsel did not adequately investigate certain “red flags,” especially concerning alcohol use, low intelligence, and history of head trauma. He claimed his Sixth Amendment right to effective assistance of counsel was violated.

The Fifth Circuit Court of Appeals affirmed the district court’s denial of Mr. Crutsinger’s request for investigative funds. The court denied his request for a COA, because it found that reasonable jurists could not disagree with the district court’s determination that his IAC claim was unfounded.

In Mr. Crutsinger’s IAC claim, the court followed the precedent set by *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland*, to show that counsel was not effective, Mr. Crutsinger would have to demonstrate that his counsel’s performance “fell below an objective standard of reasonableness” (*Strickland*, p 693) and that the deficient performance of counsel prejudiced his case. Both prongs need to be satisfied for an IAC claim to succeed.

The first prong of the test was evaluated against an “objective standard of reasonableness under prevailing professional norms” (*Crutsinger*, p 313). Counsel was presumed to be adequate and reasonable, meaning that the bar for showing incompetence of counsel was high. The perspective of counsel at the time of the investigation and trial was given strong consideration.

Mr. Crutsinger’s attorneys made a motion for the appointment of Dr. Goodness as a forensic expert in his case. They discussed her findings with her, and she issued a 23-page report. They decided against using her testimony or findings in their defense of Mr. Crutsinger. The court maintained that Mr. Crutsinger did not present any evidence that further investigation into his social history would have supported any defenses that he asserted. These defenses included a negation of *mens rea* due to alcohol abuse and head trauma, proof that his confession was not voluntary, and evidence to negate the prosecution’s assertion that he was “evil.”

The court found that his attorneys satisfied the first prong in being reasonable in their decisions in defending Mr. Crutsinger. It found that he could not show that their performance in his defense prejudiced his case. It determined that the investigation

was adequate, that their strategic decisions were reasonable, and that Mr. Crutsinger failed to explain what any additional investigation would reveal or how it would have changed his trial.

Finally, the court addressed the district court’s decision to deny Mr. Crutsinger funding for expert assistance and investigative assistance in the development of his IAC claim. According to *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000), he would have had to show that the services were “reasonably necessary” for his representation and that he had a “substantial need for the requested assistance” (*Clark*, p 768). His request for funding was denied because he failed to show that further investigation would have changed the course of his petition and in what way it would have affected the outcome of his case. The court of appeals found that he did not show that the district court abused its discretion in denying his funding request.

In conclusion, the court of appeals affirmed the district court’s decisions in denying Mr. Crutsinger funding for investigation and expert assistance, found that reasonable jurists could not disagree with the district court’s finding on the question of inadequate counsel, and denied his Certificate of Appealability.

#### Discussion

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that the state had to take steps to ensure that an indigent criminal defendant had a “fair opportunity to present his defense” (*Ake*, p 76). These steps included providing the defendant with an expert, at the state’s expense, to “assist in evaluation, preparation, and presentation of the defense” (*Ake*, p 83). The *Ake* Court considered the role psychiatry plays in criminal proceedings “pivotal” and said that cost is not a barrier to the appointment of an expert when a defendant’s liberty is at stake. Although *Ake* is not cited in *Crutsinger*, the cases are similar in enumerating limits on the right to expert assistance.

In *Crutsinger v. Stephens*, the district court satisfied *Ake* by appointing an expert, at defense counsel’s request, to perform a forensic evaluation of Mr. Crutsinger. Dr. Goodness’ evaluation concluded with a report, but the defense made a strategic decision not to use it. Although Mr. Crutsinger claimed that his representation was inadequate because counsel failed to investigate further the “red flags” raised by Dr. Goodness, the court ruled that the investiga-

tion was adequate and that counsel's decision did not prejudice his case. The court did not address the circumstances under which it would be appropriate to provide expert assistance in preparing an appeal.

In *Crutsinger*, the fifth circuit determined that Mr. Crutsinger's defense was sufficient and that further investigation into Dr. Goodness' findings would not have changed the outcome of his case. Cases involving indigent defendants who request funding for different aspects of their defense continue to raise important questions about the extent of the state's responsibility to provide such defendants with resources. In *Crutsinger*, limits were set on the right to investigative and expert assistance in a postconviction challenge and the right to a fair, but not a perfect, trial was emphasized.

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## Should Medicaid Cover the Cost of Applied Behavioral Analysis for the Treatment of Autism?

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### The Eleventh Circuit Court of Appeals Considers Whether Applied Behavioral Analysis for the Treatment of Minors with Autism Spectrum Disorders Is Experimental in Deciding Whether Medicaid Coverage Is Required

In *Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2013), Plaintiffs KG, ID, and CC sued Elizabeth Dudek, Interim Secretary for the Florida Agency for Health Care Administration, for violating the Medicaid Act by denying Medicaid coverage of Applied Behavioral Analysis to treat plaintiffs' Autism Spectrum Disorders. The district court granted the plaintiffs a permanent injunction and subsequent declaratory judgment. Appeal was then taken to the Eleventh Circuit.

### Facts of the Case

Plaintiffs KG, ID, and CC were three minors with Autism or Autism Spectrum Disorders who received Florida Medicaid. Florida, as a Medicaid participant under the federal Medicaid Act, provided early and periodic screening and diagnostic and treatment services (EPSDT) to Medicaid-eligible minors, including the plaintiffs, who were found to have Autism or Autism Spectrum Disorders when evaluated. Once plaintiffs received a diagnosis of Autism or Autism Spectrum Disorders, Florida was required under the Medicaid Act's EPSDT provision to provide them with any treatment necessary "to correct or ameliorate" those conditions discovered during EPSDT screening, regardless of whether the treatment was specifically covered by Florida's Medicaid plan.

The plaintiffs were all prescribed Applied Behavioral Analysis by their physicians, an early intensive behavioral interaction treatment that uses a structured, one-on-one program to treat the behavioral problems associated with Autism and Autism Spectrum Disorders.

However, the Florida Agency for Health Care Administration denied plaintiffs' coverage for Applied Behavioral Analysis on the basis that Florida Medicaid guidelines indicated that "Medicaid does not pay for community behavioral health services [such as Applied Behavioral Analysis] for treatment of autism [or] pervasive developmental delay" and Applied Behavioral Analysis treatment was experimental and thus not medically "necessary" for the treatment of Autism Spectrum Disorders (*Garrido*, p 1155).

Plaintiff KG alleged that, under 42 U.S.C. § 1983, Florida's denial of Applied Behavioral Analysis violated the Medicaid Act's EPSDT provision. KG sought a declaration from the district court that Florida's exclusion of behavioral health services for treatment of Autism Spectrum Disorders violated the Medicaid Act and a preliminary and permanent injunction directing Florida's Agency for Health Care Administration to amend Florida's Medicaid Handbook to ensure that KG received Medicaid coverage for Applied Behavioral Analysis, consistent with the recommendations made by the treating physician.

After a magisterial hearing, the district court directed Ms. Dudek to provide Medicaid coverage for KG's Applied Behavioral Analysis treatment as prescribed by his treating physician.

Later, two additional plaintiffs (ID and CC) joined KG, seeking similar relief. The parties filed