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### Summary of Blackburn v. State, 129 Nev. Adv. Op. 8

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CRIMINAL LAW & PROCEDURE – PSYCHOLOGICAL ASSESSMENTS

**Summary**

An appeal addressing whether a psychological evaluation and risk assessment based on clinical judgment in addition to psychological tests comports with Nevada law, and whether the district court abused its discretion in accepting such an assessment when making a sentencing determination.

**Disposition**

The Court held that, in addition to diagnostic tools, a clinician may rely on his or her own opinion in making a clinical judgment in a psychosexual evaluation. Further, the Court concluded the evidence in the record supported the district court's decision to deny defendant's request for a new psychosexual evaluation. The judgment of the conviction was reinstated.

**Factual and Procedural History**

Frank Blackburn pleaded guilty to attempted sexual assault. Before sentencing, a licensed social worker, John Pacult, performed a psychosexual evaluation of Blackburn as required by NEV. REV. STAT. § 176.139. During the assessment, Pacult used four different actuarial diagnostic tools, which resulted in a prediction that Blackburn was in a range of low to moderate risk of reoffense.

In addition to the actuarial tools, Pacult considered various documents provided by the Division of Parole and Probation, including Blackburn's plea agreement, multiple police reports, and Blackburn's SCOPE and arrest records. Pacult also spoke with Blackburn's wife, his daughter, the author of the presentence investigation (PSI) report, and the physician who had treated Blackburn for his bipolar disorder for ten years. Pacult's conclusion after the additional interviews was that the diagnostic tools underestimated the risk and that Blackburn had a high risk to reoffend.

Blackburn filed a motion to strike the psychosexual evaluation and to order a new evaluation. The court denied the motion and sentenced Blackburn to prison. Blackburn appealed, whereupon the Court reversed and remanded for the district court to conduct an evidentiary hearing on whether Pacult's evaluation comported with currently accepted standards of assessment.<sup>2</sup>

**Discussion**

Justice Pickering wrote the opinion, with Justices Saitta and Hardesty concurring.

**I. Blackburn's motion for a new evaluation**

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<sup>1</sup> By Victoria Mullins

<sup>2</sup> *Blackburn v. State*, Docket No. 56246 (Order of Reversal and Remand, Nov. 5 2010).

The Court analyzed Blackburn's claim that the word "standard" in the statute referred to "an objective measurement that practitioners can quantify and use." The Court disagreed with Blackburn's focus on a single word in the statute and instead interpreted the statute as a whole. The Court determined that because the statute allowed a professional to make their assessment based upon *a* currently accepted standard of assessment, rather than *the* currently accepted standard of assessment, a particular method was not required. Instead, the statute required only that the basis of the psychosexual report be some currently accepted standard that satisfied the requirements of NEV. REV. STAT. § 176.139.

The Court stated that NEV. REV. STAT. § 176.139 defines what the evaluation must include as well as what it may include. The legislature's inclusion of what may be included indicates that actuarial tools are not the only tools allowed in an evaluation. Further, in interpreting the term "diagnostic tools" in the realm of mental health care, the Court determined that these tools constitute an "enormous number of psychometric instruments commercially available" and thus do not refer exclusively to actuarial tools.

## **II. Blackburn's claim of abuse of discretion**

The Court reviewed whether the district court abused its discretion in accepting Pacult's evaluation in making its sentencing determination.<sup>3</sup> The district court had an obligation to determine whether the evaluator was qualified<sup>4</sup> and whether the evaluation was conducted under currently accepted standards of assessment. The district court was required to make specific findings so that its reasoning was available for review. Although the district court failed to make these findings, the Court found that it did not abuse its discretion as the record adequately supported its decision.<sup>5</sup>

## **Conclusion**

The Court affirmed the judgment of the district court. The evidence on record was sufficient to support the district court's decision to deny Blackburn's request for a new psychosexual evaluation and to reinstate the judgment of conviction.

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<sup>3</sup> See Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

<sup>4</sup> NEV. REV. STAT. § 176.139(2).

<sup>5</sup> The record consisted of all items used by Pacult in his evaluation, as well as testimony by defense expert Dr. Chambers.