

## Defending the Elderly

BY J. VINCENT APRILE II

The criminal justice system has begun to recognize the need to prosecute vigorously cases of elder abuse, neglect, and financial exploitation by creating prosecutorial units to specialize in these types of cases with an emphasis on training those prosecutors and law enforcement officers on the unique aspects of the elderly as potential or actual victims of crime. (See, e.g., ABA Policy Midyear 2008-105A, Urges Vigorous Prosecution of Elder Abuse, Exploitation, <http://tinyurl.com/86pmkrg>.) Certainly this is an excellent policy and an approach necessitated by the mental and physical conditions that often affect the elderly who are victimized.

However, frequently absent from this approach is a recognition that those lawyers who will be called upon to represent elderly clients charged with crimes need similar training that focuses on the needs and problems often present in an elderly criminal defendant. As more and more people join the ranks of the elderly in America, the number of potential elderly who will face criminal charges grows just as does the number of elderly victims of crimes. In this context, the elderly, whether in the role of a victim or a suspect, need the assistance of lawyers who appreciate the potential conditions and limitations older individuals may suffer.

A criminal defense attorney, whether retained or appointed, must view an elderly client through two separate frames. Counsel must appreciate that the elderly client is presumed to be mentally and physically capable, when properly advised and assisted, of understanding the lawyer's advice and making decisions regarding important matters in the case. But defense counsel must be alert to the possibility that an elderly client may be experiencing cognitive impairment that is not apparent.

For example, dementia is a loss of brain func-

tion that occurs with certain diseases. Alzheimer's is a form of dementia, accounting for 50 to 80 percent of dementia cases. Dementia negatively impacts memory, thinking, language, judgment, and behavior. Dementia is usually found in older people, occurring rarely in people under the age of 60. As a person grows older, the risk of dementia increases. In most cases, it is a degenerative, non-reversible condition.

Common signs and symptoms of dementia, although varying in individuals, include: (1) memory loss; (2) difficulty communicating; (3) inability to learn or remember new information; (4) difficulty with planning and organizing; (5) difficulty with coordination and motor functions; (6) personality changes; (7) inability to reason; (8) inappropriate behavior; (9) paranoia; (10) agitation; and (11) hallucinations.

Thus, dementia, depending on the individual's quota of symptoms, could render an elderly client *mentally incompetent* to stand trial, either temporarily or permanently. As a result, it is incumbent on counsel representing an elderly defendant to be certain that the client has either no dementia or that the specific dementia symptoms will not, either individually or in toto, adversely impact the client's *mental competency* to stand trial.

There are a variety of examinations and tests available to confirm a diagnosis of dementia and to determine the degree of severity as well as whether the condition is a by-product of another condition, such as a stroke, depression, or alcoholism, and is treatable.

Additionally, when representing the elderly defendant, counsel must also determine whether the client's medical conditions will interfere with the defendant's *physical competence* to stand trial. (See, e.g., *United States v. Doran*, 328 F. Supp. 1261, 1263 (S.D.N.Y. 1971).) Physical competency focuses on the accused's medical condition and whether the physical problems the defendant is experiencing will be exacerbated by subjecting the infirm defendant to trial, increasing significantly the risks to the accused's health.

Many of the elderly suffer from one or more medical conditions, including various heart conditions, breathing problems, diabetes, and bone and joint disorders. Often these conditions, their severity, and the pain and suffering that accompany them are not immediately apparent to counsel. Defense counsel must inquire into the medical conditions or symptoms an elderly client may be experiencing.

---

**J. VINCENT APRILE II** retired after 30 years as a public defender with the Kentucky Department of Public Advocacy and joined Lynch, Cox, Gilman & Goodman, P.S.C., in Louisville, Kentucky, where he specializes in criminal law, both trial and appeal, employment law, and litigation. He is past chair of the editorial board of *Criminal Justice* magazine and a contributing editor. He is the recipient of the 2012 Louisville (Kentucky) Bar Association's Distinguished Service Award.

## HUMAN RIGHTS WATCH REPORT ON ELDERLY IN PRISON

On January 28, 2012, Human Rights Watch released its 104-page report, *Old Behind Bars: The Aging Prison Population in the United States*, which is the result of Human Rights Watch visiting nine states and 20 prisons and interviewing prison officials, experts in corrections and gerontology, and prisoners. The report found, for example, that the number of sentenced state and federal prisoners 65 or older increased at 94 times the rate of the overall inmate population between 2007 and 2010. The prevalence of state prisoners serving life sentences or sentences of 20 years or more ensures that many inmates will not be released from prison until they are extremely old, if at all. The report identifies numerous issues that face both elderly prisoners and the prisons that confine them. Solutions to these problems are limited at present by inadequate budgets, lack of medical resources, existing prison structures that cannot accommodate the elderly inmates' physical infirmities, insufficient support from government, and a lack of planning on these issues. Human Rights Watch also provides recommendations to address the problems identified and analyzed in the report. The complete report is available at <http://tinyurl.com/7hd5erp>.

Physical competency to stand trial weighs both the medical evidence of the elderly defendant's health problems and the availability of remedial measures, such as a shortened trial day, appropriate medication, at-hand medical equipment, and standby medical personnel. Courts also analyze whether the physical problems of the defendant are temporary or permanent when considering whether a postponement of the trial is a workable solution.

Even when the degree and severity of dementia is insufficient to render the elderly defendant mentally incompetent to stand trial, that dementia may be sufficient to demonstrate physical incompetency to stand trial.

Issues of mental and physical incompetency to stand trial are not unique to the elderly defendant, but the occurrence of either or both of these issues is more prevalent in the older defendant and often much more difficult to recognize.

The presence of dementia in the elderly defendant

may also be relevant to issues pertaining to the client's conduct during law enforcement investigation of the case. An elderly client's confession, consent to search, or other decisions may be undermined by the accused's dementia. (*But see* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that "coercive police activity is a necessary predicate to a finding that a confession is not 'voluntary' within the meaning of the Due Process Clause").) Even if the dementia is inadequate to justify the exclusion of evidence on constitutional grounds, the accused's dementia may be relevant to the jury's view of the credibility of the confession or other decisions made by the client. (*See, e.g.*, Crane v. Kentucky, 476 U.S. 683 (1986).)

Similarly, the defendant's decision not to testify at a jury trial may be the result of the elderly defendant's dementia. In that situation, defense counsel may need to find a way to inform the jury of this reason why the defendant will not take the stand.

In those cases involving elderly prosecution witnesses, defense counsel should be alert to the possibility that those witnesses themselves may suffer dementia and concomitant memory problems that could raise credibility issues. Defense counsel, where there are appropriate indications of dementia in an opposing witness, should seek access to the witness's medical history through pretrial motions.

In sentencing, defense counsel should be aware of the extremely low recidivism rates for elderly defendants. Department of Justice statistics show that prisoners 55 or older recidivate at a rate of just 2 percent. (Timothy A. Hughes et al., *Trends in State Parole, 1999–2000*, BUREAU JUST. STAT. SPECIAL REP. (Oct. 2001), <http://www.bjs.gov/content/pub/pdf/tsp00.pdf>.) Other studies have indicated that there is virtually no recidivism for individuals age 60 or older. (*See, e.g.*, Kyung Yon Jhi & Hee-Jong Joo, *Predictors of Recidivism Across Major Age Groups of Parolees in Texas*, JUST. POL'Y J., Spring 2009.)

Additionally, elderly inmates, particularly those convicted of nonviolent crimes, usually present a host of problems for confinement facilities that may militate against imprisonment and support a probated sentence. "Our analysis suggests that housing non-violent elderly inmates in prison is not a good use of scarce resources since they are potentially very expensive yet represent a relatively low risk to society." (Patrick McMahon, *Aging Inmates Present Prison Crisis*, USA TODAY, Aug. 10, 2003, *Nation* Section, quoting from the *Report of the California Legislative Analyst's Office*.) Cor-

rectional facilities are recognizing the unique problems elderly prisoners can present, particularly as more inmates are in this age group. "In addition to health care issues, work assignments, co-payments, nutritional requirements, concerns for victimization, end of life issues and appropriate staffing are concerns that will have to be addressed." (RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* (Nov. 2003).)

Confinement for the elderly may subject them as a group to more risks than prisoners in other age groups. Elderly inmates may be more vulnerable to self-harm, suicide, or victimization than their younger counterparts. Older prisoners are necessarily wary of being victimized by younger and stronger inmates and view their advanced age as a significant factor marking them as potential victims. (James W. Marquart et al., *The Health Related Concerns of Older Prisoners: Implications for Policy*, 20 *AGEING & SOC'Y* 79 (2000).) Due to the natural reduction in physical mobility associated with aging, older inmates suffer stress because they are less able to perform routine tasks in confinement, such as showering or using the bathroom.

(Jack M. Guralnik et al., *Physical Disability in Older Americans*, 48 *J. OF GERONTOLOGY* 3 (1993).) All of these factors, where appropriate, should be brought to the attention of the sentencing court.

Additionally, defense counsel should use life expectancy tables to demonstrate the relationship of a potential sentence of imprisonment, regardless of its length, to the estimated life span of the defendant. For an elderly defendant, a sentence of 10 years may be the equivalent of a life sentence or even a death sentence. Demonstrating the uniqueness of every defendant is essential to a sentencing presentation, and the specific age-related circumstances of an elderly defendant must be part of the sentencing equation.

These are but a few of the issues that a defense counsel must consider when representing an elderly client. Just as the police and prosecutors must learn to appreciate and address the unique characteristics of the elderly victim, criminal defense counsel, whether assigned or retained, must also factor into the representation of an elderly defendant the conditions and limitations that often, but not inevitably, coincide with the aging process. ■