# Prisoner Rights and Suicide

### *Police Failure to Remove Blankets From the Cell of a Suicidal Inmate Does Not Constitute Deliberate Indifference or Gross Negligence*

Dark Bradley committed suicide while in the custody of the City of Ferndale Police Department. The representative of his estate, Stephanie Bradley, sued the city and multiple members of the police department alleging gross negligence and deliberate indifference under 42 U.S.C.S. § 1983 and the Fourteenth Amendment. The United States District Court for the Eastern District of Michigan denied defendants' motions for summary judgment based on immunity, and the defendants appealed. In the case of *Bradley v. City of Ferndale*, 148 Fed. Appx. 499 (6th Cir. 2005), the U.S. Court of Appeals for the Sixth Circuit considered whether the actions of the defendants evidenced a conscious disregard of Mr. Bradley's suicidal tendencies and whether the district court therefore erred in denying defendants' motions for summary judgment.

#### *Facts of the Case*

On January 22, 2000, Officer Paul Simpson of the Ferndale Police Department arrested the decedent, Dark Bradley, on an outstanding bench warrant from Oakland County. As Mr. Bradley was being processed at the Ferndale Police Station, he remarked to Officer Simpson that Simpson should give him his gun so that he (Bradley) could shoot himself. Officer Simpson thought that Mr. Bradley made the remark in jest; however, he reported the remark to his duty command officer, Lieutenant Thomas J. Thomson. Mr. Bradley's jail card was marked with a red sticker indicating the need to apply universal and suicide precautions. Lt. Thomson contacted the Oakland County Sheriff's Department and requested that Mr. Bradley be transferred to the Oakland County Jail that night because of a personnel shortage at Ferndale.

At 8:40 p.m., Mr. Bradley was placed in a cell. Officer Simpson removed Mr. Bradley's personal belongings. He provided Mr. Bradley with two blankets. Dispatcher Jason White performed a cell check at 9:16 p.m. and found Mr. Bradley unconscious with a blanket tied around his neck. Mr. Bradley was eventually pronounced dead of self-asphyxiation.

Stephanie Bradley, representative of the Bradley estate, filed suit in district court alleging that the defendants (City of Ferndale and several police personnel) acted with deliberate indifference to Mr. Bradley's known suicidal tendencies, in violation of the Fourteenth Amendment. Plaintiff further alleged that defendants' actions constituted gross negligence, which was the proximate cause of Dark Bradley's death. The defendants filed motions for summary judgment asserting immunity. The district court denied the motions and the defendants appealed.

#### *Ruling and Reasoning*

The Sixth Circuit Court of Appeals reversed the decision of the district court denying defendants' motions for summary judgment. To state a claim under 42 U.S.C. § 1983, a "plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law" (*West v. Atkins*, 487 U.S. 42, 48 (1988)). A government official performing discretionary functions is entitled to qualified immunity ("entitlement not to stand trial or face other burdens of litigation," *Mitchelle v. Forsyth*, 472 U.S. 511, 526 (1985)) in his individual capacity if his conduct does not violate constitutional standards in light of clearly established law at the time of the alleged violation (*Barber v. Salem*, 953 F.2d 232, 236 (6th Cir. 1992)). If there was a constitutional violation, it must be determined "whether the right was clearly established" (*Saucier v. Katz*, 533 U.S. 194, 201 (2001)) so that a reasonable official in the defendant's position knows that his actions violate that right.

The Sixth Circuit analyzed whether the City of Ferndale and the specific officers named in the suit violated a substantive right of Mr. Bradley, protected under the Fourteenth amendment. The case of *Estelle v. Gamble*, 429 U.S. 97 (1976) stated that when prison officials act with deliberate indifference to the serious medical needs of prisoners so that they inflict unnecessary pain or suffering, their actions violate the Eighth Amendment. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court adopted a subjective standard for determining whether an official had shown deliberate indifference: "the official must

both be aware of the facts from which the inference could be drawn that a substantial risk of serous harm exists, and he must also draw the inference." Case law within the Sixth Circuit has established that suicidal tendencies are serious medical needs for the purposes of due process analysis and that failure to take adequate precautions to prevent suicide may constitute deliberate indifference to the decedent's serious medical needs.

The Sixth Circuit determined that the actions of police personnel did not evidence a conscious disregard of Mr. Bradley's suicidal tendencies. According to the appellate court, as the duty command officer, it was Lt. Thomson's responsibility alone to decide whether to remove the blankets from Mr. Bradley's cell and whether to institute 15-minute checks. Therefore, the appellate court did not find fault with the junior officers. These officers received no orders from Lt. Thomson to remove the blankets or to do 15-minute checks. With regard to Lt. Thomson, the Sixth Circuit pointed out that Article 7 of the Ferndale Policies and Procedures does not specifically require removal of blankets or 15-minute checks of suicidal inmates. As further evidence that Lt. Thomson did not show conscious disregard for Mr. Bradley's safety, the appellate court indicated that Lt. Thomson recognized Mr. Bradley's condition and made provisions to expedite Mr. Bradley's transfer to the Oakland County Jail, a facility better equipped to provide for Mr. Bradley's needs. The Sixth Circuit stated that plaintiff did not establish a violation of Bradley's constitutional rights.

Under Michigan law, government employees are not immune from tort liability if the employee's conduct constitutes gross negligence that is the proximate cause of injury or damage. The Sixth Circuit stated that the immediate, efficient, and direct cause of Mr. Bradley's death was not the actions of the defendants, but rather, Mr. Bradley's own act of hanging himself. The Sixth Circuit concluded that the defendants were entitled to qualified immunity.

*Dissent*

Circuit Judge Damon J. Keith held that *Bradley* stated a viable claim of deliberate indifference against Officer Simpson and Lt. Thomson. They both knew that Mr. Bradley had made a suicidal statement, yet they had provided him with blankets and did not closely monitor him. Justice Keith also thought that a jury could reasonably conclude that Officer Simpson's and Lt. Thomson's actions were the proximate cause of Mr. Bradley's death. Justice Keith indicated that under the holding of the majority, a detainee's suicide could never be the result of the gross negligence of police officers because, by their definition, every successful suicidal detainee will have died from self-inflicted acts.

*Discussion*

According to a 1993 report from the U.S. Department of Justice (NCJ-143284), suicide is the most common cause of death of inmates. The rate of suicide is higher in lock-ups (local confinement facilities) than it is in jails or prison settings. Detainees in lock-ups have a high rate of substance intoxication and withdrawal. Over half of suicides in lock-ups occur within the first 24 hours. Hanging is the most common method of suicide in all correctional settings.

The Sixth Circuit stated that the right at issue in this case is the detainee's right to reasonable protection against taking his own life if that detainee has demonstrated a strong likelihood that he will commit suicide. The appellate court was also clear that there is no general right of pretrial detainees to be correctly screened for suicidality or to be protected against committing suicide. Whether the defendants in *Bradley* acted with deliberate indifference to the serious medical needs of Mr. Bradley is a mixed question of fact and law, which the Sixth Circuit reviewed *de novo*.

This decision of the Sixth Circuit applies the reasoning of the Supreme Court's *Farmer v. Brennan* decision to a mental health case. *Farmer* dealt with a postconviction, transsexual inmate housed in the general prison population. In that case, the *mens rea* for "deliberate indifference" was analyzed with regard to Dee Farmer's Eighth Amendment rights. The Court concluded that a prison official would be liable under the Eighth Amendment for acting with deliberate indifference to inmate safety only if the official actually knew (subjective standard) that the inmate faced a substantial risk of serious harm and then disregarded that risk. As in *Farmer*, the *Bradley* appellate court used a subjective standard to determine whether the City of Ferndale and the police officer defendants showed conscious disregard for a substantial risk of serious

harm. Unlike *Farmer*, *Bradley* focused on the Fourteenth Amendment rights of a pretrial, suicidal detainee.

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# Termination of Parental Rights

### *Psychologist Expert Testimony Allowed Regarding Future Ability to Comply With Conditions for Children's Return*

In *In Re Daniel R.S.*, 706 N.W.2d 269 (Wis. 2005), the Supreme Court of Wisconsin considered whether a trial court erred in excluding specific testimony from a mother's single expert witness. The court found that the defense's expert psychologist should have been allowed to respond to queries regarding the mother's future ability to comply with Brown County's conditions for custody of her children, as the county's expert social workers had been.

#### *Facts of the Case*

Darell, 4, and Daniel, 3, were removed from their mother Shannon's care in infancy by child protection services, related to their older sister's death of dehydration and hyperthermia. The room temperature had been 98 degrees with the thermostat turned up. The mother and father had merely observed Tianna from her bedroom door in the 17 hours before her death.

Conditions for return of the children specified in the protective services order included maintenance of suitable housing and employment for three months, compliance with visitations, meetings with Human Services, individual counseling, psychological evaluation, budget counseling, and cooperation with probation without further legal violations. The father had not contested termination of his parental rights.

Brown County sought termination of parental rights, alleging that the children had been outside Shannon's home for over 6 months, she had failed to meet the conditions established, and there was a substantial likelihood that she would not meet the conditions within the following 12 months. Two expert witnesses (a Tribal Judge and one of Shannon's social workers) testified on behalf of Brown County. Each opined (without objections) that Shannon was not able to meet the required conditions within 12 months. The Tribal Judge, himself a social work professor, had not interviewed her or observed the children, but based his opinion on past behavior. A single psychologist, Gerald Wellens, PhD, completed an interview, record review, and psychological testing and testified on Shannon's behalf. After objections, Dr. Wellens was precluded from opining whether Shannon was able to meet the conditions. The jury found grounds to terminate Shannon's parental rights, as she neither had, nor would within 12 months, meet the required conditions for the return of her children.

The central issue on appeal was whether the circuit court erred by excluding opinion testimony of Shannon's expert witness regarding the substantial likelihood that she was able to meet the conditions established for safe return of her children within a 12-month period. Her appeal was also predicated on the higher standard of proof required by the Indian Child Welfare Act and on unreasonable delay. The appeals court rejected the mother's arguments, affirming the order of termination, and Shannon further appealed.

#### *Ruling and Reasoning*

The Wisconsin Supreme Court ruled that the circuit court erred by not applying the proper legal standard to the admissibility of the psychologist's testimony. The circuit court failed to consider that courts customarily allow psychologists to opine about future behavior, such as in dangerousness and sexual predator cases. The court found that Shannon's only expert's opinion testimony was central to her defense against termination of parental rights and should have been allowed.

Though the court was "reluctant" to delay permanent placement, they took into account the mother's constitutional rights and the possibility that placement with the mother might be in the children's best interest. The Wisconsin Supreme Court reversed and remanded the case for further consistent proceedings.

*Dissent*

The dissent argued that the majority opinion's recognition of the children's best interests

> . . . are hollow words that are belied by the lack of any reasoning that explains why Darell's and Daniel's best interests will be served by the possibility of an eventual return to Shannon at some unspecified time, rather than by a permanent home now where each little boy will have a chance to develop to his fullest potential.

The children had been out of Shannon's home for more than three years, their need for a permanent home ignored. Shannon had known the tasks requisite in regaining custody since 2001.

The dissent noted the majority's opinion was based on an evidentiary ruling preventing Shannon from obtaining one answer from one witness over a three-day trial to a question that had been asked and answered in a slightly different manner. Dr. Wellens was permitted to respond regarding whether there were "any psychological impediments that prevent her from completing any of the conditions that are listed." His response was "no"; the jury could have inferred that it was substantially likely that Shannon would meet the conditions. Finally, while a defendant in a criminal case has a right to present a defense, the mother was not a criminal defendant; rather, the termination proceedings were civil.

*Discussion*

The Wisconsin Supreme Court aptly did not agree with the trial court that only social workers were qualified to offer opinions predicting ability to comply with conditions for return of children. Psychologists routinely offer testimony regarding opinions of violent recidivism, applying scientific data consistently correlated with violence (*Barefoot v. Estelle*, 463 U.S. 880 (1983)), as well as utilizing risk instruments designed specifically to address violence potential. The contested psychologist testimony in this case was not about violence prediction, but rather the likelihood that a mother will be able to complete her case plan. Risk instruments, anchored in the behavioral sciences literature (see e.g., Stowman S, Donohue B: Assessing child neglect: a review of standardized measures. Aggress Violent Behav 10:491–512, 2005) are also available to assist the forensic examiner regarding the risk for abuse and neglect.

In this case, the prediction question was of importance because the Wisconsin law on involuntary termination of parental rights (Wis. Stat. § 48.415 (2001)) requires one of various conditions to be present, including such factors as the continuing need for protection or services (including a six-month period of placement outside the home, during which the parent fails to meet the conditions established, and when there is a substantial likelihood that the parent will not meet the conditions within nine months), failure to assume parenting responsibility, commission of a serious felony against one's children, and homicide. Within the continuing need for protection or services factor, the court must be convinced that the parent not only does not currently possess appropriate parenting skills or ability to protect the child from abuse or neglect, but also that the parent does not have the capacity or the willingness to do so in the allotted time frame.

The court considers the ability to provide appropriate supervision and protection and not engage in neglect or abuse as displaying adequate parenting abilities (a very low threshold). Therefore, adequate parenting can simply mean provision of adequate housing in a physically and emotionally safe environment, medical care, and school enrollment. For example, failure to maintain or obtain employment indicates a general propensity toward irresponsibility and lack of commitment, and also is relevant to the ability of the parent to provide basic necessities. Brown County's conditions for return of the children were developed to assist parents in meeting these basic standards. Failure to follow the conditions (assuming the parent has the ability to) brings into question a parent's interest and commitment to the child and the child's most basic needs. A child fatality related to neglectful supervision may well indicate a lack of ability or willingness to care for the child appropriately.

In *Santosky v. Kramer,* 455 U.S. 745 (1982), the U.S. Supreme Court decided that "clear and convincing evidence" is the minimal constitutional standard in termination of parental rights cases, though in Native American cases the standard may be "beyond a reasonable doubt." Since the severing of parental rights may be the ultimate punishment of a parent, a higher standard than the civil standard of "preponderance of the evidence" is appropriate.

As the dissent noted, time is of the essence for the sake of the children. Disruption of the placement process can make permanent placement more difficult, and disruption of a current attachment bond with the foster family for possible return to an am-

bivalent parent is not an optimal solution. Although the mother had a previous child fatality and had not followed the conditions for return of her children for several years, in this case the Supreme Court remanded the case to allow the respondent's expert witness to proffer testimony regarding the mother's future ability to meet the conditions.

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# Sexually Violent Predators Laws

### *Sexually Violent Predator Testimony Is Not Novel Science Subject to a* Frye *Hearing*

In *Commonwealth v. Dengler*, 890 A.2d 372 (Pa. 2005), Harry Dengler appealed the trial court's finding that he was a sexually violent predator (SVP). He argued that the court should not have admitted the opinion testimony of an expert witness psychologist before subjecting her testimony to the Pennsylvania test of admissibility for novel scientific testimony derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Supreme Court of Pennsylvania affirmed the trial court and superior court and held that SVP expert opinion testimony was not novel science and therefore not subject to a *Frye* hearing.

#### *Facts of the Case*

As part of a plea bargain, 34-year-old Harry Dengler pleaded guilty to aggravated indecent assault and corruption of minors after an incident with his 12-year-old niece in which he fondled and kissed her breasts through her clothing, fondled and inserted his finger into her vagina, and performed oral sex on her against her protests. The trial judge ordered the State Sexual Offenders Assessment Board to perform a Sexually Violent Predator (SVP) assessment under Megan's Law II. The Act defines the term "sexually violent predator" as a person convicted of a sexual offense and likely to engage in predatory sexually violent offenses due to a "mental abnormality" or "personality disorder" (42 Pa. Cons. Stat. § 9791 et seq. (2000)). The Act further outlines specific factors to be considered in the determination of a defendant's SVP designation; however, the Act does not limit the analysis to these factors.

The State Sexual Offenders Assessment Board issued a report prepared by Board member Veronique Valliere, a licensed psychologist. Mr. Dengler declined to be interviewed by a board investigator. Dr. Valliere completed her assessment by relying on available records, including court records in the case: the probable cause affidavit and court records relating to two prior sexual offenses. Dr. Valliere opined that Mr. Dengler met the criteria for classification as an SVP based on her experience and a review of the factors listed in the Act, such as "the research, his behavior, his past records, [and] his previous diagnoses."

Under extensive cross-examination, Dr. Valliere conceded that statutory terms, including "mental abnormality" and "sexually violent predator" were not diagnostic terms in psychiatry or psychology. Further, she conceded that there was no specific test to determine SVP status. Based on Dr. Valliere's testimony, the court found Mr. Dengler to be an SVP and sentenced him to prison and probation. In addition, on his release from prison, he was to comply with the registration provisions of Megan's Law II.

#### *Ruling and Reasoning*

Mr. Dengler appealed. The superior court unanimously affirmed the trial court, stating that it would defy logic to ask an expert witness to apply Megan's Law II in conducting an assessment and then exclude the expert's testimony merely because she employed Megan's Law II language in her assessment. Further, they said that psychological or psychiatric testimony offered at an SVP hearing was not novel scientific evidence subject to *Frye*.

The Supreme Court of Pennsylvania granted further discretionary review to provide guidance on this issue of first impression. Mr. Dengler argued that Dr. Valliere had based her testimony on statutory terms not generally accepted or having clinical meaning in

the field of psychology. As such, he argued that the trial court erred in not subjecting Dr. Valliere's testimony to the Pennsylvania test of admissibility for novel scientific testimony derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Supreme Court of Pennsylvania affirmed the Superior Court and held that the trial court did not abuse its discretion in admitting the expert testimony without a *Frye* hearing.

As background, the court noted that experts could give testimony in the form of an opinion under Rule 702 of the Pennsylvania Rules of Evidence. Further, the court clarified that in Pennsylvania, *Frye* was the standard and not *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993). The *Frye* standard requires that the scientific principle on which the opinion is based "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." In discussing its decision, the court dismissed the objection to Dr. Valliere's use of the terms "mental abnormality" and "sexually violent predator," stating they were defined in detail in Megan's Law II, making them terms of art. Thus, criticizing Dr. Valliere's testimony based on acceptance within the psychological or psychiatric community "simply misses the mark."

The court then pointed out that *Frye* does not apply every time science comes into the courtroom; rather, it applies only to proffered expert testimony involving novel science. They reasoned that because the legislature provided the framework for assessing whether an offender is an SVP, it should be deemed generally accepted in the community of professionals who conduct SVP assessments. Further, because it is from the legislature, it cannot be deemed "novel science" and therefore no *Frye* hearing is necessary. Because Dr. Valliere followed the statutory factors, it was not novel science and no *Frye* test was required.

The court remarked that other jurisdictions have held, under a traditional *Frye* analysis, that *Frye* does not apply to expert psychological or psychiatric testimony regarding a sexual offender's likelihood of recidivism, because such evidence is not novel. Although the appellant pointed out numerous cases in which such testimony was held to a *Frye* standard, the court argued that each of these cases involved actuarial assessments. Because Dr. Valliere did not employ actuarial methods to predict recidivism, these cases were not relevant.

In his concurring opinion, Justice Baer wrote that he agreed that the evidence was not subject to a *Frye* analysis because the theory and methodology underlying the SVP assessment was not novel. However, he argued that statutorily defined factors do not relieve a court from conducting an independent analysis under *Frye* of the novelty of a given theory or method used to address those factors. For example, if the legislature based SVP designation on phrenology (head contours) to categorize defendants, the fact that the legislature made the policy would not eliminate the requirement of a *Frye* hearing.

### *Discussion*

The primary issue for the forensic practitioner is that the court said that it no longer considers SVP assessments to be novel science and therefore such assessments are not subject to a *Frye* hearing. It explained that the legislature had defined the factors the psychiatrist or psychologist should consider, essentially removing part of the scientific argument behind the case. This analysis raises concern, considering the nature of science. As noted in Justice Baer's concurring opinion, statutorily defined factors do not necessarily relieve a court from conducting an independent analysis under *Frye* of the novelty of a given theory or method used to address those factors. Although it is true that several of the factors listed in Megan's Law II are currently scientifically validated risk factors for recidivism, science is a constantly evolving field, molded by ongoing research and expertise. As such, it is naïve to suggest that the legislature could keep up with the current scientific body of research to forego the need for an evaluation by the court. For example, the court specifically distinguished Dr. Valliere's approach from examiners using actuarial instruments. However, many experts in the sex offender field routinely use such actuarial instruments, which have a large body of scientific evidence supporting their use. What if the expert, based on her experience and understanding of the scientific evidence disagreed with the legislatively defined factors? For example, Megan's Law II lists the age of the victim as a factor, which has little support for recidivism in the literature.

Although we agree that the theory underlying SVP evaluations as described in the case are well validated to the extent that it is reasonable to say they no longer qualify as novel science, this conclusion is independent of the legislation.

One issue not discussed by the court that this case raises is the role of experts when testifying to what have traditionally been fact-finder issues. In this case, the psychologist was encouraged to testify on whether a defendant qualified for legal terms of art, such as "mental abnormality" and "sexually violent predator." The appellant correctly argued that the terms were not validated within the field of psychiatry or psychology. The traditional role of the expert has been to educate the court, not to make legal decisions about who qualifies under a legal definition. Much of the difficulty could have been avoided had the expert limited her testimony to the diagnoses that the defendant had met, the risk factors for recidivism (from the Act and otherwise), and how these relate to his risk.

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## Release of Insanity Acquittees

### *Polysubstance Dependence and Personality Disorder, Not Otherwise Specified, Were Held to Be Mental Diseases for Purposes of Continued Civil Commitment of an Insanity Acquittee*

In *State v. Klein*, 124 P.3d 644 (Wash. 2005), the Washington State Supreme Court held that polysubstance dependence and personality disorder, not otherwise specified (NOS), constituted mental disease for the purpose of continued commitment of an insanity acquittee. The court also held that the presence of the same mental disease that formed the basis for the NGRI acquittal was not necessary for ongoing commitment.

#### *Facts of the Case*

The petitioner, Tina Klein, stabbed her 20-month old nephew with a butcher knife while in a cocaine-induced psychosis. The victim's parents successfully intervened to save his life. Ms. Klein was found not guilty by reason of insanity and granted conditional release. She repeatedly violated the terms of her conditional release by abusing methamphetamine and marijuana and failing to report to her probation officer.

The trial court revoked Ms. Klein's conditional release and ordered her admitted to Western State Hospital on November 27, 2001 (eight years after her acquittal). Ms. Klein received diagnoses of polysubstance dependence, in full sustained remission, in a controlled environment and personality disorder, NOS, with borderline, antisocial, and passive-aggressive features.

After unsuccessfully petitioning for transfer to a residential substance abuse treatment program, Ms. Klein petitioned the trial court for full release on the basis that she no longer had a mental disease or defect because her polysubstance dependence was "in remission." At a hearing on the petition, the experts for the state and defense both reached similar diagnoses but disagreed as to whether Ms. Klein's diagnoses legally constituted mental diseases. The state's expert testified that Ms. Klein had a "moderate" risk of reoffending, and the defense expert testified that she had a "low to moderate" risk of reoffending. The state's expert testified that Ms. Klein had a "rather high" risk of experiencing another psychotic episode if she returned to using drugs and that her risk of reoffending would be "much higher than the average individual" if she returned to using drugs.

The trial court denied Ms. Klein's petition for full release and held that Ms. Klein "continues to suffer from a mental disease or defect" and "remains a substantial danger to others and presents a substantial likelihood of committing criminal acts jeopardizing public safety, as a consequence of her mental disorder." Ms. Klein appealed both findings to the court of appeals, which affirmed the trial court's findings.

Ms. Klein appealed to the Supreme Court of Washington. There were three issues before the court. First, whether there was substantial evidence in the record to support the finding that Ms. Klein continued to have a mental disease or defect; second, whether insanity acquittees with a mental disease other than the one that formed the basis for their acquittal must be unconditionally released; and third, whether there was substantial evidence in the record to support the finding of ongoing dangerousness.

*Ruling*

The Washington Supreme Court affirmed the court of appeals by a six to three vote. The court held that polysubstance dependence, in remission, constitutes a mental disease and that an insanity acquittee need not continue to have the same mental disease or defect that formed the basis for the acquittal to be eligible for continued commitment. The court held that there was sufficient evidence in the record to support the finding that Ms. Klein presented a substantial danger to others or a "substantial likelihood of committing criminal acts jeopardizing public safety or security."

*Reasoning*

Whether Ms. Klein had a mental disease is a question of fact. Whether polysubstance dependence is a mental disease is a matter of law. The court noted that the legislature had not defined the terms "mental disease or defect." Thus, courts may apply the dictionary meaning to the term. The court recognized the terms "mental disease or defect" as "often synonymous with" the term "mental disorder," as used in the DSM IV-TR. However, the court included the caveat that not all disorders in the DSM "will rise to the status of 'disease or defect' under our statutes." The court reasoned that there were sufficient statutory safeguards to prevent the definition of "mental disease or defect" from becoming overly inclusive. A finding of NGRI, for example, implicitly requires that the mental disease be of sufficient severity to prevent the defendant from knowing the wrongfulness of his or her act. Continued commitment of an insanity acquittee requires a finding that the individual has a mental disease or defect and poses a danger to others due to mental disease or defect. This implicitly excludes disorders that "do not manifest themselves by dangerous behavior and therefore cannot support continued custody." Furthermore, the court noted that Washington law presumes that an NGRI acquittee "continues to be insane." Therefore, dangerousness, not the presence of mental disease, will continue to be the "primary inquiry" in the release statute.

The court rejected Ms. Klein's argument that a mental disease that is in remission is no longer a mental disease. The court noted that the state's expert testified that Ms. Klein's polysubstance dependence was only in remission because she was in a controlled environment.

With regard to Ms. Klein's argument that she must be unconditionally released because she no longer had the same mental disease that formed the basis for her insanity acquittal, the court found this argument unpersuasive for four reasons. First, the court noted that the Washington statute modifies the term "mental disease or defect" with the indefinite article "a." Second, the court noted that Ms. Klein's polysubstance dependence was reasonably related to the condition that formed the basis for her acquittal. Third, requiring the presence of the same mental disease would undermine public safety. An acquittee may recover from the original mental disease but may remain equally dangerous due to a "related disorder." Fourth, requiring the presence of the same mental disease would be impractical because of changing diagnostic terminology and disagreement among examining psychiatrists. The majority observed, ". . . to mandate release based on mere semantics would lead to absurd results and risks to the patient and the public."

The court rejected Ms. Klein's argument that there was insufficient evidence of dangerousness presented at the hearing. The court noted that Ms. Klein bore the burden of proving the absence of mental disease or lack of dangerousness and that both experts testified that Ms. Klein "did pose a substantial danger if she returned to drugs."

*Dissent*

In a vigorous dissent, Justice Saunders argued that, as a matter of law, polysubstance dependence is not a mental disease or defect because "it is well-settled that drug addiction is not a legal 'mental disease or defect.' " Therefore, Ms. Klein should have been unconditionally released because she "isn't insane. She's a drug addict."

*Discussion*

The *Klein* decision is significant because it expanded the definition of "mental disease" to include substance dependence, which is often explicitly excluded from legal definitions of mental disease. Furthermore, by expanding the definition of mental disease, it lowered the threshold for the continued commitment of insanity acquittees.

Courts granted insanity acquittees greater protection during the 1960s and 1970s. For example, in *People v. McQuillan*, 221 N.W.2d 569 (Mich.

1974), the Michigan Supreme Court struck down a statute that provided for the automatic commitment of insanity acquittees. The court held that the statute violated Equal Protection and Due Process. However, fueled by community concern after the *Hinckley* insanity verdict, courts and legislatures have applied increasingly stringent safeguards to the release of insanity acquittees. In *Jones v. United States,* 463 U.S. 354 (1983), the Supreme Court held that it was constitutionally permissible to indefinitely confine NGRI acquittees unless they prove they are no longer mentally ill or dangerous. The *Jones* Court reasoned that the NGRI finding was "sufficiently probative of mental illness and dangerousness" to justify a presumption of ongoing mental illness and dangerousness.

The Insanity Defense Reform Act of 1984 (18 U.S.C. § 4243 (1984)) required federal insanity acquittees who were found NGRI of an offense involving "bodily injury" or "serious" property damage to prove by clear and convincing evidence that release would not "create a substantial risk of bodily injury to another person or serious damage to the property . . . due to a present mental disease or defect." With respect to all other offenses, the burden of proof is on the acquittee, by preponderance of the evidence.

In an exception to the trend of reducing the threshold for the commitment of insanity acquittees, the Supreme Court held in *Foucha v. Louisiana,* 504 U.S. 71 (1992), that commitment of an insanity acquittee required both the presence of mental disease and dangerousness due to the mental disease. Of note, Washington was among six states that allowed continued commitment of insanity acquittees based on dangerousness alone before *Foucha.* By expanding the definition of "mental disease," the *Klein* decision granted lower courts greater latitude in continuing the commitment of insanity acquittees.

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# Defendants' Rights

### *A Defendant's Right to an Independent Psychiatric Expert Does Not Include the Provision of State Funds to Hire an Expert Chosen by the Defendant*

In *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit Court of Appeals addressed the claim that a state court's refusal to provide funds for the defense to hire a psychiatrist to assess potential mitigating factors at the capital sentencing phase of a trial violates due process. In a narrow interpretation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), the court rejected the proposed expansion of rights to which an indigent defendant is entitled.

#### *Facts of the Case*

Don William Davis received the death penalty for the murder of Jane Daniel, plus 80 years' imprisonment for burglary and theft. Mr. Davis, an indigent defendant, pled not guilty by reason of mental disease or defect, and, per Arkansas law, the court suspended proceedings and ordered a psychiatric evaluation. Dr. Jenkins, a psychiatrist at a regional mental health clinic, concluded that Mr. Davis was not incompetent or insane, but that he did show evidence of attention deficit hyperactivity disorder (ADHD). Mr. Davis then underwent a 30-day extensive evaluation at the Arkansas State Hospital in which examiners also concluded that Mr. Davis was competent to stand trial and was not insane at the time of the alleged crime. Mr. Davis subsequently moved for funds ($2,000) to hire Dr. Marr, a clinical psychologist, to perform an independent psychological evaluation for the purpose of assisting the defense in the delineation of mitigating factors which could be at issue in the penalty phase. The defense cited *Ake v. Oklahoma*, 470 U.S. 68 (1985) as precedent for this additional evaluation. The defense contended that the first two evaluations did not specifically address mitigating factors and were "undertaken on behalf of the court and [were] not protected by physician-patient confidentiality or evidentiary privilege." The trial court denied the request and the trial proceeded. Since it had no substantiating evidence, the defense did not rely on an insanity defense at trial. Mr. Davis was found guilty. Dr. Jenkins testified during the penalty phase at the request of the defense.

After exhausting his state court remedies, Mr. Davis filed a petition for a writ of *habeas corpus*. The

United States District Court for the Western District of Arkansas denied but granted a certificate of appealability on two issues: (1) the state's denial of funds to hire an independent psychiatric expert to present mitigation evidence at the sentencing phase was possibly a violation of due process (per *Ake v. Oklahoma*), and (2) the failure of Mr. Davis' counsel to argue *Coulter v. State*, 804 S.W.2d 348 (Ark. 1991), pertaining to the allowance of funds, was a possible violation of right to effective counsel.

*Ruling and Reasoning*

Judge Murphy, of the Eighth Circuit Court of Appeals, denied the petition, maintaining that "Dr. Jenkins' assistance met the requirements of *Ake*, and that the court's denial of funds was not contrary to or an unreasonable application of clearly established federal law."

According to Judge Murphy, the *Davis* case was not, as Mr. Davis posited, decisively parallel to *Ake*. Ake mounted an insanity defense; Mr. Davis did not. Ake introduced future dangerousness as an aggravating factor; Mr. Davis did not. Moreover, the state did not introduce any psychiatric factors at Mr. Davis' sentencing. *Ake* held that

> When the State at a capital sentencing proceeding presents psychiatric evidence of the defendant's future dangerousness . . . due process requires access to a psychiatric examination on relevant issues, to a psychiatrist's testimony, and to assistance in preparation at the sentencing phase.

Mr. Davis did not satisfy the first component of the requirement, thus negating any right to further psychiatric services.

Even so, the trial court still provided two psychiatric examinations to discern any relevant issues, and Dr. Jenkins testified for the defense at the sentencing phase, willingly answering questions for the defense, as was affirmed by defense counsel at a postconviction hearing. The Eighth Circuit found that the court-appointed expert, as well as the extensive evaluation at the state hospital, more than satisfied the requirements of *Ake*. Securing an additional $2,000 for a third evaluation by a psychologist specifically selected by Mr. Davis was viewed as superfluous and "beyond the assistance required by *Ake*." Here, Judge Murphy is not paying homage to *dicta*, but, alternatively, is referring to the Supreme Court's warning that *Ake* should not be interpreted to mean "that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own."

*Discussion*

The *Ake* decision is itself a broad extension of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Gideon*, a sentinel case for defendants' rights, guaranteed indigent defendants access to an attorney. In *Gideon*, the role of the attorney is clear. In *Ake* the role of the psychiatrist is not clear. Mr. Davis' argument is a consequence of the confusion innate to such far-reaching decisions as *Ake*, where the Court ruled that the State was constitutionally bound to provide "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," as well as providing "assistance in preparation" of mitigating factors "at the sentencing phase."

But a psychiatrist is not an attorney. An attorney, appointed by the court, must defend his or her client. Should a court-appointed psychiatrist, per *Ake*, defend the client as well? Mr. Davis' argument relies on an interpretation of *Ake* that would require the "*Ake* psychiatrist" to act as a partisan rather than an independent evaluator. In his dissent, Chief Justice Rehnquist criticized the Court's ruling in *Ake* as too "broad," asserting that the Court should "make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."

An "appropriate" psychiatric evaluation does not include designing the evaluation for a predetermined, favorable outcome, nor should it include a "search" for ways to exculpate the defendant. It should be unbiased and can then be scrutinized by the attorney for ways in which to use it or not, to aid in the client's defense. Per *Ake*, the defendant should be entitled to only one competent opinion—whatever the conclusion—from a psychiatrist who truly acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions before trial, and to testify if called, the court clarified that there is no justification for a defendant's entitlement to an opposing psychiatric view, or to a "defense-oriented" psychiatric advocate.

In the *Davis* appeal, the Eighth Circuit did not address the possibility that *Ake* endorsed "partisan" psychiatric evaluations. The court simply held: (1) that Mr. Davis did not meet the basic criteria to mount an insanity defense, thus negating the need

for an appointed psychiatric expert at the sentencing phase, and (2) that the lower court's application of the law was not egregious. However, the "*Ake* issues" are not resolved and will undoubtedly be revisited in the future.

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## Public Access to Competency Reports

### *The Supreme Court of Vermont Refuses to Shield Media Access to a Report on Competency to Stand Trial, Despite Dissent's Concern Over "Rank Invasion of Privacy"*

In *State v. Whitney*, 885 A.2d 1200 (Vt. 2005), the Supreme Court of Vermont affirmed a trial court's decision to refuse to seal a competency-to-stand-trial report stemming from the psychiatric evaluation of Edgar Whitney, a defendant charged with first-degree murder. The primary issue considered by the court was whether Vermont statutes governing public access to court records bar access to a competency report that is never formally admitted into evidence at the competency hearing. The court also considered whether public access to a competency report should be barred in a case in which (1) the report contained potentially prejudicial information, (2) the defendant was not informed by counsel "that his communications with the psychiatrist would become public and available to the news media," and (3) the defendant did not request the evaluation.

#### *Facts of the Case*

Edgar Whitney was arraigned on a charge of first-degree murder in Vermont. After Whitney attempted suicide, the trial court ordered an evaluation *sua sponte* for competency to stand trial. A psychiatrist performed the evaluation, and a corresponding report was filed with the court. Both the state and defense stipulated in writing that Mr. Whitney was competent to proceed to trial, and the court stated that it would accept the stipulation because the report supported it and the report was entered into the record. Concerned that the court may have "accepted" the report, defense counsel stated that he wanted the report to be part of the record, but he was not offering it into evidence because "he did not want the press to have access to it."

Defense counsel immediately moved that the record be sealed because the report was never formally introduced into evidence. A recess was granted to allow attorneys for the press, who intended to access the report, to enter a motion opposing the request to seal. The defense argued that § 6(b)(19) of Vermont's Rules for Public Access to Court Records denied the public access to the report because it was never formally introduced into evidence. The defense also argued that the report contained information that could prejudice Mr. Whitney "in a potential civil suit and prejudice his right to a fair trial under the federal and state constitutions." The trial court refused to seal the record because it had indeed relied on the report to make its decision regarding competency and because the defense failed to show where the report was prejudicial.

The defendant appealed to the Supreme Court of Vermont, arguing that there was no presumptive First Amendment right of access to competency reports not admitted into evidence and that the trial court erred by denying defendant's motion to seal. The defense also argued that releasing the report could prejudice Mr. Whitney in a pending civil suit and his criminal trial.

#### *Ruling and Reasoning*

The Supreme Court of Vermont affirmed the judgment of the trial court. The majority reasoned that the defense's primary argument was that the competency report should not be open to the public because it was never formally admitted into evidence. The majority conceded that § 6(b)(19) does not allow access to such competency reports if they are not admitted into evidence, but then followed by stating, "We find defendant's technical argument unconvincing" with respect to the report's not being a part of evidence, noting that "for all practical purposes" the report was admitted into evidence based on the fact that the trial court relied on the report in determining that it would accept written stipulations from counsel on both sides. Given this reasoning, the ma-

jority found that the trial court did not err on this matter. Furthermore, given prior Vermont case law on the issue of public access to court records such as competency reports, the majority concluded that the instant case did not warrant a First Amendment analysis.

Regarding the matter of purported prejudicial information in the report, the majority reasoned that the defendant had every opportunity to demonstrate that the report would be prejudicial, but never did. According to the court, Mr. Whitney "only vaguely argued that releasing the report could prejudice him. . . ." The majority conceded that there might be reasonable arguments made about why the defendant wanted the report sealed; however, the court noted that Mr. Whitney never actually presented any of those arguments. The majority found that the lower court balanced the information presented to it by the defense and concluded that Mr. Whitney would not be harmed by public access to the report, particularly given that "the report contained nothing that had not already been in the newspaper."

*Dissent*

The judge writing for the dissent raised a sharply contrasting opinion, stating that

> Because of the rank invasion into the privacy of the accused for no apparent good reason, I respectfully suggest the issue presented in this case deserves greater scrutiny by the Court and a more careful assessment of the competing interests.

The dissent criticized the trial court for not using "more judicial vigor" in determining if the defendant's trial rights would be violated despite defense counsel's being "restrained or inconclusive" in arguments regarding the potentially prejudicial information contained in the competency report. The dissent wrote that the public did not have an absolute right to court records and that the trial court, pursuant to Vermont statute apart from access rules, was mandated to admit only the "relevant portion of a psychiatrist's report" into evidence, thereby shielding a defendant from unnecessary and potentially damaging public scrutiny. The dissent reasoned:

> Release of the entire evaluation done by a mental health professional on any defendant will certainly not promote the goal of encouraging the kind of objective examination that [Vermont statute] intends."

The dissent opined that the possibility of issues shared with a psychiatrist appearing on the front page of a newspaper could be even more of a deterrent to open self-report than the established protection from information being used against the defendant at trial. The dissent "would reverse and remand for a hearing on the motion to seal," reasoning that there was no useful public purpose to disclose the record that would outweigh the defendant's right to a fair trial.

*Discussion*

In the instant case the court primarily addressed a legal technicality that hinged on whether a report on competency to stand trial was open to the public based on its being entered into evidence; however, concerns put forth by the dissent, such as "rank invasion into the privacy of the accused for no apparent good reason" appear most relevant to the forensic evaluator. In the instant case, a forensic report with potentially prejudicial information landed in the lap of the media, and the dialogue that ensued indicated that evaluees (or their counsel) may not fully appreciate the potentially public nature of reports generated following court-ordered forensic evaluations. In fact, the defense attorney stated that had he known such, he would have "advised the defendant not to say anything" during the forensic evaluation. The case highlights the importance of adherence to the American Academy of Psychiatry and the Law ethics guidelines that instruct forensic evaluators routinely to provide notice of the nonconfidential nature of evaluations before conducting forensic assessments.

The same concern issued by the dissent calls to attention a debate about whether, in certain instances, a forensic evaluator may consider weighing the prejudicial versus probative value of information included in a competency report. When inclusion of data in a competency report is likely to be damaging in some way to an evaluee and that information is not relevant to the opinion regarding competency, an evaluator may consider withholding such information from the competency report. This can be a difficult determination, but judicious application of such a practice might, in certain cases, prevent the need for the court to address said issue.

An important detail about the nature of the forensic evaluation performed in the instant case which was only briefly mentioned by the court, but discussed in an article entitled "Whitney report: chilling details" (*The Stowe Reporter*, September 29, 2005) was that the evaluation and report in the instant case were addressing both competency to stand trial and

sanity at the time of offense. The latter evaluation, in which it is sometimes necessary to detail a defendant's (often incriminating) account of the events leading to arrest, changes the dynamic, making it difficult for the forensic evaluator to withhold potentially prejudicial information from a report, given that such information may be essential to supporting an expert opinion regarding sanity at the time of the alleged offense.

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## *Farmer* Progeny

### *Deliberate Indifference Not Found in a Case in Which a Prisoner Was Placed in Conditions That Exacerbated His Psychosis and Caused Him Severe Distress*

In *Scarver v. Litschser*, 434 F.3d 972 (7th Cir. 2006), the Seventh Circuit Court of Appeals affirmed a lower district Wisconsin court ruling that Wisconsin prison officials neither subjected the plaintiff to cruel and unusual punishment nor were they deliberately indifferent to his needs when they placed him in conditions that exacerbated his psychotic illness and caused the plaintiff severe distress.

#### *Facts of the Case*

Christopher Scarver, the plaintiff, was an extremely dangerous man with diagnosed schizophrenia, who murdered three people; two of his three victims were murdered during his incarceration at Wisconsin's Columbia Correction Institution in 1994. One of his victims was Jeffrey Dahmer, the notorious cannibal murderer of 17 young men. Mr. Scarver was actively psychotic while he was incarcerated and had continuous auditory hallucinations and psychotic delusions. He believed God had ordered him to commit the murders. In addition, Mr. Scarver attempted suicide twice (once by setting himself on fire) while incarcerated at Columbia Correctional Institution. Wisconsin prison officials believed that they could not adequately provide for the safety of other inmates or staff. Arrangements were made to transfer Mr. Scarver to a more secure setting.

After being briefly detained in the U.S. Medical Center for Federal Prisoners for a psychiatric evaluation, he was transferred to the most secure prison in the Federal system at Florence, Colorado. Mr. Scarver was detained at the Federal prison in Florence for five years without incident and was surprisingly well behaved. He was given audiotapes to quell the auditory hallucinations, and he was permitted daily contact with the other inmates.

At the request of Wisconsin prison officials, Mr. Scarver was transferred to the then newly built Wisconsin Secure Program Facility, a "Supermax" prison, at Boscobel, Wisconsin. Such facilities are designed to house particularly violent or disruptive inmates whose behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates. The Wisconsin prison officials were reportedly unaware of the improved behavior of Mr. Scarver at the federal prison in Florence, Colorado, and thus did not take this information into account in determining his management at the Supermax. The Supermax facility had a restrictive classification system that inmates were subjected to on entering the facility. All inmates are given Level 1 (the most restrictive) status for at least the initial 30 days. Inmates could then progress to higher (less restrictive) levels after behavioral criteria were met and could transfer out of the Supermax facility to a less restrictive prison if they moved beyond Level 5.

Level 1 status entailed being confined all but four hours per week in a small, windowless, constantly illuminated cell with little or no contact with other human beings. The cells had no air conditioning and were extremely hot during the summer months. Mr. Scarver decompensated in this environment. The heat of his cell reportedly interacted with his antipsychotic medications. The constant illumination and inability to use his audiotapes exacerbated his psychosis. While at the facility, Mr. Scarver engaged in self-injurious behavior such as banging his head against the wall and cutting his wrists and head with a razor in attempts to remove the voices that were inside his head. In addition, he attempted to commit suicide on two separate occasions by overdosing on

antipsychotic medications and then a large number of Tylenol tablets.

Mr. Scarver was unable to progress beyond Level 1 during his three-year imprisonment at the Supermax facility. The defendants attributed Mr. Scarver's bizarre behavior and his inability to progress beyond Level 1 to his being uncooperative and difficult and allegedly failed to make arrangements to address the ongoing underlying problem, his psychosis. Mr. Scarver was eventually transferred to a state prison in Colorado where he was allowed to mingle with other inmates. He was not considered a management problem by staff at this facility.

Mr. Scarver filed a civil rights suit alleging that the officials of the Wisconsin Secure Program Facility violated his constitutional right not to be subjected to cruel and unusual punishment. The district judge, after dismissing charges against several of the defendants, held that a jury could reasonably find that the remaining defendants had violated Mr. Scarver's constitutional right by subjecting him to conditions of confinement that had significantly aggravated his mental illness. However, she granted summary judgment for the remaining defendants on the ground of "qualified immunity." She ruled that settled law did not establish the "unlawfulness" of their behavior. Mr. Scarver appealed.

*Ruling and Reasoning*

The appeals court affirmed the lower court's ruling without addressing the "qualified immunity" issue. The court opined that there was no evidence that the officials knew that the conditions at the high security prison would exacerbate his illness and cause him severe distress. Officials were aware of Mr. Scarver's distress; however, they did not attribute his distress to his confinement conditions. In other words, because there was no conscious awareness by the prison officials that the conditions to which they subjected Mr. Scarver exacerbated his illness and caused him to suffer, they could not be found to be deliberately indifferent toward Mr. Scarver. Thus, Mr. Scarver's claim of being subjected to cruel and unusual punishment could not be substantiated.

Deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions. The appeals court found that there was evidence that the Wisconsin Secure Program Facility acted in Mr. Scarver's best interest to the best of their ability. They cited that Mr. Scarver was given "constant psychiatric attention," given antipsychotic medication, and watched closely by prison staff. Since the prison was reportedly unaware of the conditions of Mr. Scarver's improved behavior at the federal prison in Florence, Colorado, the court reasoned that the prison officials were not privy to better, more appropriate alternatives for Mr. Scarver's incarceration. Ironically, Judge Posner indicated that if Mr. Scarver's lawyers had argued that prison officials were aware of widely disseminated correctional literature concerning the effects of isolation and severe conditions on the mentally ill, a much stronger argument could have been made that the officials did know of the risk to Mr. Scarver and were thus deliberately indifferent to Mr. Scarver's plight.

In addition, the appeals court observed that Mr. Scarver's history of mental illness and his murdering two inmates while in a less restrictive environment created a scenario that complicated his treatment. Reasonable measures undertaken by prison officials to protect other inmates and staff may aggravate psychotic illness of individuals like Mr. Scarver. In such cases, they opined these actions are not unconstitutional, as prison officials must be given "considerable latitude" in designing measures for controlling the violently psychotic inmate. Prison officials should not go beyond what is necessary for security. Finally, they observed that the Constitution does not directly address prison conditions and that management of prison is best left to state authorities, not federal judges.

*Discussion*

The court cited *Farmer v. Brennan*, 511 U.S. 825 (1994), when it discussed the standard it used to determine if the prison officials were deliberately indifferent to Mr. Scarver's plight at the Supermax facility. *Farmer* established that in order for a prison official to be found deliberately indifferent, the official must actually know the risk of harm to an inmate and disregard that risk by failing to act appropriately to protect the inmate from that circumstance. The appellate court opined that the prison officials should have known that a person like Mr. Scarver would decompensate if placed into a harsh environment like that of the Supermax prison. *Farmer* firmly established that proving a prison official should have known of the risks to

an inmate is not enough to prove deliberate indifference, and this case followed the rationale and logic outlined in that ruling.

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# Malpractice Action Stemming From Court-Ordered Independent Medical Examination

### *Medical Malpractice Claim in the Context of a Court-Ordered Independent Medical Examination Is Actionable According to the Supreme Court of Virginia*

In the case of *Harris v. Kreutzer*, 624 S.E.2d 24 (Va. 2006), the Supreme Court of Virginia considered whether a cause of action for medical malpractice and/or intentional infliction of emotional distress existed in a case involving a claim brought by an evaluee against a clinical psychologist who conducted a court-ordered independent medical examination (IME) of her. The court held that a cause of action regarding medical malpractice can exist, but the circumscribed nature of IMEs limits the duty solely to not causing harm to the "patient" in actual conduct of the examination. The court set a much higher bar to establish a cause of action under the guise of intentional infliction of emotional distress, pointing out that, among other things, the conduct of an evaluator must be "outrageous" and lead to distress "so severe that no reasonable person could be expected to endure it."

#### *Facts of the Case*

Nancy J. Harris brought a personal injury suit in 1992, seeking damages for a traumatic brain injury that she alleged resulted from an automobile accident. The trial court granted her request and required her to undergo an IME pursuant to the Supreme Court of Virginia Rule 4:10, to determine the nature and extent of the alleged injury. Although she initially refused the "Rule 4:10 examination," Ms. Harris later acceded to the examination, and the jury ultimately awarded her damages totaling $419,769.66. She subsequently filed a motion for judgment against Dr. Kreutzer, the clinical psychologist who had examined her by order of the court, alleging medical malpractice, defamation, and intentional infliction of emotional distress arising from the IME conducted by him on January 19, 1996.

Regarding the claim of medical malpractice, Ms. Harris contended that Dr. Kreutzer, in undertaking the Rule 4:10 examination, owed a duty to her to exercise reasonable and ordinary care and to avoid causing her harm in the conduct of the examination. She argued that Dr. Kreutzer breached his duty by not complying with the applicable standard of care for his profession and claimed that he was "deliberately abusive" and acted "with disregard for the consequences of his conduct" which led her mental and physical health to drastically deteriorate. She noted specific examples of such conduct, alleging Dr. Kreutzer "verbally abused [her], raised his voice to her, caused her to break down in tears in his office, stated she was 'putting on a show,' and accused her of being a faker and malingerer." She also contended that Dr. Kreutzer had prior knowledge of her underlying fragile health, citing traumatic brain injury from the automobile accident, being a victim of armed robberies with subsequent PTSD, and being suicidal.

Regarding the claim of intentional infliction of emotional distress, Ms. Harris claimed that Dr. Kreutzer's conduct during the IME was "intentionally designed to inflict emotional distress upon [her] or was done with reckless disregard for the consequences when he knew or should have known that emotional distress would result." She further claimed his conduct was "outrageous" and her subsequent emotional distress was "severe."

Dr. Kreutzer filed a demurrer to the motion for judgment, specifically arguing that "a Rule 4:10 examination did not create a physician-patient relationship, so he owed no legally cognizable duty to Harris," and thus there was "no claim for medical malpractice as a matter of law." Furthermore, he stated that even if a physician-patient relationship

existed in such an examination, Ms. Harris failed to allege sufficient facts to constitute a breach of the standard of care required of a reasonable and prudent physician in his profession. He separately argued that Ms. Harris failed to allege facts that would support a claim for the tort of intentional infliction of emotional distress. The trial court granted demurrer to Dr. Kreutzer on all counts and dismissed Harris' motion for judgment with prejudice. Ms. Harris subsequently appealed only on the counts of medical malpractice and intentional infliction of emotional distress. The Supreme Court of Virginia agreed to hear the case on appeal.

*Ruling and Reasoning*

The court concluded that the trial court properly granted the demurrer as to Count III of intentional infliction of emotional distress, but it erred in granting demurrer as to Count I which denied a cause of action on the issue of malpractice. The court affirmed in part, reversed in part, and remanded the case for further proceedings in light of the ruling.

The court first explained the standard of review in this case brought under demurrer which "tests the legal sufficiency of a motion for judgment and admits the truth of all material facts that are properly pleaded." The court explained that it was only able to state whether a cause of action existed on Counts I and III.

Regarding Ms. Harris' claim of intentional infliction of emotional distress, the court succinctly relied on prior Virginia case law that found that liability for intentional infliction of emotional distress (under any circumstance, not just during an IME) "arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." The court found that Ms. Harris failed to allege injuries that "no reasonable person could be expected to endure," and that Dr. Kreutzer's alleged conduct was simply not of the "outrageous" nature required to support a claim of intentional infliction of emotional distress in Virginia. However, the court did not state that a court-ordered IME would bar cause of action for this tort, if sufficient facts supporting such a claim did in fact exist.

The court analyzed in detail the alleged Count I of medical malpractice, considering whether Dr. Kreutzer owed Ms. Harris a duty in conduct of the IME, and if so, what that duty entailed. The court first explained that it would use the term "physician" to include the clinical psychologist defendant for purpose of the analysis. The court based its analysis on Virginia's existing malpractice statutes and case law from other states. The court recognized that an IME did not on the surface appear to be a traditional, consensual physician/patient relationship from which would normally spring a duty, but reasoned that, when a physician agrees to conduct an IME, he "expressively consents" to a relationship with the "patient," and when a "patient" raises emotional harm as an issue, knowing that the court will order an IME, it is "implied" that the "patient" is consenting to a relationship with a physician for the purposes of court-ordered evaluation. However, the court reasoned that in the context of such a "strictly circumscribed" evaluation, "a Rule 4:10 physician's duty is limited solely to the exercise of due care consistent with the applicable standard of care so as not to cause harm to the patient in actual conduct of the examination." The court cited an example of malpractice stemming from such a scenario, in which a physician conducting an IME caused physical injury to an evaluee during an examination, failing to exercise due care by rotating a previously injured "patient's arm and shoulder well beyond prescribed limits, injuring the patient and breaching the standard of care." The court emphasized that "liability is restricted to a breach of that duty only," and not for example, a duty to come to a medicolegal opinion that will avoid any future harm's coming to the evaluee. To do so, the court cited, could lead to a "chilling effect" and "would make it impossible to find any expert witness willing to risk a lawsuit based on his testimony as to his opinions and conclusions before any tribunal."

*Discussion*

This case falls in line with other cases cited by the Supreme Court of Virginia that find a "circumscribed duty" of forensic evaluators to their evaluees, but notes that the duty is specifically limited to not harming the evaluee as a result of actual conduct of the examination. It should be emphasized that the court did not assign a duty to an evaluator to withhold opinions stemming from evaluations that could predictably result in an adverse disposition for the evaluee. Nevertheless, assignment of any duty by the courts, however limited, opens the door to malpractice claims, and forensic evaluators should be aware that in certain jurisdictions, they are not strictly immune from malpractice claims stemming from court-ordered IMEs.

Fortunately, the court in the instant case gave due weight to the importance of a circumscribed

duty severely curtailed from that duty's emanating from a traditional physician-patient relationship. Should other courts more liberally interpret the terms of forensic evaluators' duty to evaluees, the very nature of forensic work could be altered in a manner contrary to the ability of evaluators to offer objective opinions that the courts desire.

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