

failure to qualify for transitional release was not justification for unconditional release. Therein lies the challenge for placement when complex risks and needs are involved. Mr. Cabbage was an outlier for the SVP program in which he was placed because of his dementia. With his sexually violent history, he also presented a challenging combination of problems for a nursing home level of care.

The case illustrates the need for public policy to address the risk management and care requirements for sexually violent offenders who fail to benefit from treatment while requiring higher and changing levels of care related to medical, psychiatric, and aging conditions. Given the typically long lengths of stay in SVP programs, problems associated with aging among these populations will continue to expand. Forensic psychiatric expertise can aid in developing, evaluating, and legislating systems of care for sexually violent offenders designed to manage violence risk while attending to the health care and daily living needs of the offenders.

Disclosures of financial or other potential conflicts of interest: None.

First Amendment Rights and Forensic Evaluations

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Collateral Consequences of First Amendment Protected Activities Can Be Used as Criteria in Forensic Evaluations

In *Oliver v. Roquet*, 858 F.3d 180 (3d Cir. 2017), the Third Circuit Court of Appeals reversed and remanded a district court decision that supported a First Amendment retaliatory claim of a civilly committed patient against a psychologist. The circuit court found that while patients are still able to enjoy First Amendment liberties, medical consequences of those protected activities can be used as criteria in forensic decision making.

Facts of the Case

Lorenzo Oliver was civilly committed under New Jersey's Sexually Violent Predator Act (N.J. Stat. § 30:4-27.32 (1999)). Mr. Oliver was in treatment at the Special Treatment Unit (STU) in Avenel, NJ, where his case was reviewed at least annually by the Treatment Progress Review Committee (TPRC) to make recommendations to the Clinical Assessment Review Committee (CARP) regarding his advancement along five phases of treatment.

During one of these reviews, Debra Roquet, PsyD, a psychologist on the TPRC, recommended that Mr. Oliver not be promoted to the next phase of treatment, a recommendation that the CARP followed. Her recommendation was made, in part, because she thought that Mr. Oliver's focus on legal activities interfered with his ability to participate in recommended treatment and negatively impacted his relationship with staff. Mr. Oliver was a paralegal and advised other civilly committed individuals with legal matters, including at least one involving the STU. He was also an editor of a legal newsletter that focused on the rights of STU residents. Dr. Roquet reported that Mr. Oliver said that he did not attend treatment at Alcoholics/Narcotics Anonymous "because he was too busy" (*Oliver*, p 185). In addition, Dr. Roquet reported that during an interview with him, Mr. Oliver "did not demonstrate remorse for his crimes or empathy for his victims" (*Oliver*, p 195). She also noted that he often charged legal fees for the work he did for peers, something which she described as manipulative.

Mr. Oliver, representing himself, filed suit in the U.S. District Court for the District of New Jersey alleging that Dr. Roquet had recommended against promoting him in treatment in retaliation for his legal activity, thereby violating his First Amendment rights. He also made other violation claims that were dismissed by the district court. Dr. Roquet moved for dismissal, which was denied. She did not appeal, but asserted a qualified-immunity defense. Her defense was denied on procedural grounds, but the court explained that she could raise such a defense in a motion for summary judgment. However, her motion for summary judgment was denied as it was premature. Mr. Oliver argued that additional discovery was necessary, and the court agreed.

Dr. Roquet appealed to the U.S. Court of Appeals for the Third Circuit the district court's denial of her motion for summary judgment. The circuit court

also reviewed whether the district court's decision to grant discovery was an abuse of discretion.

Ruling and Reasoning

The circuit court began by discussing its jurisdiction over the appeal. Mr. Oliver argued that Dr. Roquet did not raise qualified immunity in a timely manner; that her defense of qualified immunity was postponed rather than denied; and that, even if the qualified immunity defense were denied, it was denied on a factual rather than legal basis. The circuit court rejected these claims and asserted jurisdiction.

The circuit court then outlined the standards for a First Amendment retaliation claim, citing *Rausser v. Horn*, 241 F.3d 330 (3d Cir. 2001), based in part on *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977): plaintiff's conduct was constitutionally protected; plaintiff suffered some adverse action; and a causal link exists between the constitutionally protected act and the adverse action, "his constitutionally protected conduct was a substantial or motivating factor in the decision to discipline him" (*Rausser*, p 333).

In this case, Dr. Roquet would have to show by a preponderance of the evidence that she would have made the same decision without the protected conduct. The court acknowledged that the question at hand was the third causation prong of the *Rausser* test. Mr. Oliver argued that there is sufficient causation by showing that Dr. Roquet associated his distraction from treatment with his First Amendment protected legal activities.

The circuit court then cited *Hartman v. Moore*, 547 U.S. 250 (2006); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to establish a standard of proof which is "above the speculative level" (*Twombly*, p 555) and "more than a sheer possibility that a defendant has acted unlawfully" (*Iqbal*, p 678). The circuit court reasoned that based on this case law, Mr. Oliver needs to show that the protected activity itself was the cause of the adverse action, rather than correlates of the activity. The circuit court went on to explain that sex offender treatment professionals should not be restricted from considering the effects of protected activity on their treatment, as this would compromise treaters' ability to rehabilitate sexually violent offenders.

In applying this reasoning to the case, Mr. Oliver must show that the protected activity itself and

not its consequences led to the negative recommendation by Dr. Roquet. The circuit court held that Mr. Oliver failed to prove this result, as Dr. Roquet listed the litigation activity as a distraction from treatment, and participation in those activities led to Mr. Oliver's inability to attend AA/NA meetings, which was a recommended part of treatment. The circuit court held that Mr. Oliver did not demonstrate a cause-and-effect relationship between the protected activities and the adverse reaction against him.

The circuit court noted that it had never established the principle that Mr. Oliver claimed (i.e., that medical professionals are prohibited from considering a patient's legal activities in reaching their medical decisions). Thus, a reasonable psychologist in Dr. Roquet's position would have had no reason to believe that her actions in making a treatment recommendation violated a constitutional right. Therefore, qualified immunity for her was not precluded. The circuit court found in favor of Dr. Roquet's qualified immunity defense and reversed the district court's grant of discovery.

Discussion

In *Oliver*, the circuit court ruled that it was the clinical implications and consequences of Mr. Oliver's legal activities rather than the First Amendment-protected legal activity itself that led to the unfavorable report from Dr. Roquet, essentially rejecting any causal link between the constitutionally protected act and the adverse action.

The questions at the core of *Oliver* come up frequently in the treatment of patients in secure forensic settings. Mr. Oliver's actions as a paralegal were neither fundamentally wrong nor contraindicated as part of his treatment and could have formed an important aspect of his treatment plan in the appropriate context. However, he seems to have had significant problems with both insight and empathy that undermined his progress. Dr. Roquet thought that advancement was needed in these areas before Mr. Oliver should place substantial amounts of his focus elsewhere.

We agree with the circuit court's ruling in *Oliver*, as it was relatively clear that there was not an established causal relationship to satisfy the third prong of the *Rausser* test. However, many cases of this type of clinical predicament can be more challenging. Sometimes, there are genuine conflicts that cannot be eas-

ily resolved: for example, a time conflict between employment and a therapeutic group. Distinguishing avoidance and deflection from adaptive occupational initiatives can be an important part of the therapeutic process for both the treatment team and the patient. Forensic evaluators must strive to protect civil liberties of civilly committed patients while considering whether these activities impede treatment. The court's rationale in *Oliver* helps to set a framework to make this distinction.

In *Oliver*, the circuit court did not ultimately resolve the complicated question of First Amendment rights as they pertain to people with mental illness. The presence of a mental illness itself does not diminish a person's First Amendment rights, but in some instances behavior associated with mental illness can be at odds with a perceived right. When a mentally ill person files suit regarding breach of a First Amendment right, forensic providers, evaluators, or courts are tasked with addressing this discrepancy. Had the circuit court ruled in favor of Mr. Oliver, it could have set a precedent for the exclusion of aspects of a patient's behavior or speech from forensic evaluations. This ruling could substantially impede the tasks of risk assessment and risk management. On the other hand, ensuring that protected behaviors and expression, however provocative, are managed in a therapeutic, rather than punitive way, is an important duty of forensic evaluators and teams and is something that should be actively considered in any forensic treatment context.

Disclosures of financial or other potential conflicts of interest: None.

Propriety of Closing Statements Regarding Release of Acquittees in Insanity Defense Case

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Prosecutor's Statements During Closing Arguments, Related to Likely Duration of Civil Commitment if the Defendant Were Found NGRI, Were Prejudicial

In *State v. Dalton*, 794 S.E.2d 485 (N.C. 2016), the Supreme Court of North Carolina agreed that statements made by the prosecutor during closing arguments exaggerated the likelihood that the defendant, Melissa Amber Dalton, would be quickly released from civil commitment if found not guilty by reason of insanity (NGRI). Specifically, the court found that the prosecutor's statements were not supported by the evidence presented at trial. The court upheld the decision of the state court of appeals, affirming that prejudicial error had occurred and granting a new trial.

Facts of the Case

Ms. Dalton has a long history of mental illness, including bipolar disorder, borderline personality disorder, and substance abuse. In July 2009, Ms. Dalton was admitted to a crisis treatment facility and was prescribed escitalopram, a selective serotonin reuptake inhibitor (SSRI) antidepressant. Her treaters at the facility were unaware that Ms. Dalton had reacted negatively when prescribed a different SSRI, fluoxetine. During her inpatient stay, Ms. Dalton received multiple diagnoses, including cocaine dependence, cannabis abuse, substance-induced mood disorder, and borderline personality disorder. She was discharged after approximately three days and continued to take escitalopram. On August 20, 2009, approximately three weeks after her discharge, Ms. Dalton's boyfriend contacted her mother and asked her to check on Ms. Dalton, who appeared depressed. Ms. Dalton's mother also observed Ms. Dalton's "strange behavior" and went to the local magistrate's office, in an effort to have Ms. Dalton involuntarily committed. She was instead told to speak with a social worker and return to the magistrate's office the next day. That night, Ms. Dalton bartered electronics for a gram of crack cocaine. In the early morning of August 21, 2009, Ms. Dalton knocked on her neighbors' door claiming to have money that she owed the neighbor. When the door was opened, Ms. Dalton forced her way in and repeatedly stabbed her two neighbors, calling one by the wrong name. One neighbor died and the other sustained serious injuries. Ms. Dalton was soon located, still wearing bloodied clothing and attempting to get a ride. She was brought to the police station,