acted properly in giving the then-governing jury instruction in 2012 and did not create a substantial likelihood of a miscarriage of justice.

The Supreme Judicial Court of Massachusetts affirmed the ruling of the trial court and declined to grant relief to Mr. Piantedosi.

Discussion

Hearsay can present a complicated set of legal challenges that may not be clear to expert witnesses. As reports of other persons' statements, hearsay is generally excluded as evidence at trial, although there are exceptions. An expert with scientific, technical, or other specialized knowledge can help the trier of fact understand the evidence or determine a fact in question. An expert witness must follow the rules about admissibility of hearsay and is not allowed to introduce hearsay statements that are not in evidence at trial. Otherwise, this could become a route to relay hearsay evidence to the trier of fact. An expert witness is allowed to provide an opinion and the information the opinion is based upon; however, that information must be in evidence. On direct examination, an expert can say, for example, "In forming my opinion, I relied on the following information. . ." without divulging the hearsay evidence. Or an expert may just state an opinion, and give the reasons for it, without even first testifying to the underlying facts or data. The counsel of the opposing party is then afforded an opportunity on cross-examination to question the basis of expert opinion and challenge use of hearsay in forming an opinion. If it is revealed that hearsay evidence is indeed used, counsel is afforded an opportunity to clarify this question in redirect examination. If the counsel of the opposing party does not challenge the basis of an expert opinion, hearsay that can potentially be used to form an expert opinion will never be introduced at trial. Although the admissibility of hearsay statements is a legal concern and not a medical one, it underscores the importance of communication between the expert witness and the retaining attorney, so the expert has a clear and reasonable understanding of the limitations of testimony. Likewise, the expert witness and retaining attorney should clarify the applicable legal standard for the question the expert is hired to answer.

The ultimate question of whether a defendant is guilty or criminally responsible is reserved only for the trier of fact (i.e., judge or jury). Courts do not allow expert witnesses to usurp the role of the trier of fact as a sole factfinder. In *Piantedosi*, the Supreme Judicial Court of Massachusetts allowed the expert witness to provide an opinion that approached the ultimate question. Such an opinion may further help the trier of fact to understand the evidence or fact at hand. In addition, mental health experts are allowed to use medical or psychological terms in their testimony. In this case, the court permitted mental health experts large leeway in the scope of their opinion.

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Dangerousness Standards for Sex Offender Civil Commitment

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The Fourth Circuit Court of Appeals Considers Whether to Affirm a Federal District Court Ruling Allowing the Release of a Sex Offender from Civil Commitment

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In *United States v. Wooden*, 887 F.3d 591 (4th Cir. 2018), the government appealed a ruling to the Fourth Circuit Court of Appeals, arguing that the federal district court erred in finding that Walter Wooden, a previously convicted sex offender, did not suffer from pedophilia and thus lacked a qualifying mental disorder under the Adam Walsh Child Safety and Protection Act of 2006, 42 U.S.C. § 16901 (2006). Additionally, the government argued that the federal district court erred when it ruled that statutory construction prohibited imposing conditions of release on Mr. Wooden.

Facts of the Case

In 1972 and 1973, Mr. Wooden, then 16 years old, was thrice adjudicated delinquent for the com-

mission of sexual crimes against minors, which included sexual molestation and rectal sodomy on a minor. In 1974, Mr. Wooden was tried as an adult for "taking indecent liberties." He pled guilty and received a 10-year sentence. In 1984, Mr. Wooden was convicted and sentenced to 25 years in prison for sexually abusing an eight-year-old boy and a twelve-year-old boy, in two separate acts.

Mr. Wooden was paroled in 2000, but he was reincarcerated in 2001 and 2002 for parole violations. Mr. Wooden underwent sex-offender treatment from 2002 to 2005 and seemed to make progress. Mr. Wooden declined to submit to a polygraph test, however, and admitted to sexual contact with a child in his building's laundry room. The alleged victim denied the sexual contact, and Mr. Wooden changed his story, claiming it was a "dream." In June 2005, Mr. Wooden confessed to "deviant sexual thoughts" about children, sexual arousal around children, and sexual activity with a child, all within the prior year. Ultimately, the District of Columbia Parole Board concluded that sexual contact with a minor had occurred. They revoked his parole and reincarcerated Mr. Wooden at the Federal Correctional Institute in Butner, North Carolina.

In 2006, Congress enacted the Walsh Act, which in section 18 U.S.C. § 4248 (2006) granted the government the authority to civilly commit federal inmates deemed to be "sexually dangerous" at the end of their prison sentence. By law, the classification of "sexually dangerous" required a prior act or attempted act of child molestation or sexually violent behavior that made them "sexually dangerous to others" (18 U.S.C. § 4247(a) (5) (2006)). The Walsh Act defines a sexually dangerous offender as a person who "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released" (18 U.S.C. § 4247(a) (6) (2006)).

In 2010, as Mr. Wooden neared the conclusion of his sentence at the Federal Correctional Institute in Butner, the government initiated proceedings against him under the Walsh Act. The United States District Court for the Eastern District of North Carolina denied the petition. The government appealed to the Fourth Circuit Court of Appeals, which reversed and remanded the ruling, characterizing the lower court's analysis as "wanting in several respects." After a series of hearings, the district court held that Mr. Wooden was a sexually dangerous person and approved the civil commitment petition.

In 2014, Dr. Joseph Plaud, an expert hired by defense counsel, voiced concerns about Mr. Wooden's intellectual functioning and recommended neuropsychological testing. Mr. Wooden's counsel then hired Dr. Frederick Winsmann, an expert on volitional control in sexual offenders, who, after testing and interviewing Mr. Wooden at length, concluded that Mr. Wooden suffered from intellectual development disorder (IDD), rather than pedophilic disorder. In March 2016, Mr. Wooden filed a motion for a hearing to consider his release from civil commitment.

At the hearing, Drs. Plaud and Winsmann testified that previous evaluators misdiagnosed Mr. Wooden and that he had IDD as evidenced by his borderline IQ, communication deficits, and delayed cognitive functioning. Mr. Wooden's experts attributed his behaviors to his intellectual deficits as opposed to a specific sexual attraction to children. Dr. Winsmann claimed Mr. Wooden had a "global [sexual] interest," but due to his delays in emotional and cognitive development, he was more comfortable around children than with people closer to him in chronological age. Furthermore, Mr. Wooden had taken responsibility and denied sexual attraction for children for more than 10 years. Dr. Plaud asserted that recent evidence at Butner indicated that Mr. Wooden could control his sexual behaviors at the time of the hearing, because, though delayed, he had now matured cognitively.

The government refuted the testimony from Drs. Winsmann and Plaud with the testimony of Dr. Malinek. Dr. Malinek asserted that Mr. Wooden's crimes were not solely the result of IDD, and that there was no proven connection between IDD and sexually predatory behavior toward children. Furthermore, Dr. Malinek challenged Mr. Wooden's denial of sexual attraction to children. Dr. Malinek opined that Mr. Wooden might have intellectual impairment and still be diagnosed with pedophilia.

The district court disagreed with the government expert's arguments and found persuasive the testimony that Mr. Wooden did not suffer from pedophilic disorder but rather suffered from IDD. Thus, Mr. Wooden no longer met criteria as a dangerous child predator, and the court ordered his release without conditions.

Ruling and Reasoning

Relying on the clearly erroneous standard of review, the Fourth Circuit Court affirmed the ruling of the district court that Mr. Wooden was no longer diagnosed with pedophilic disorder, and thus could not be classified as a sexually dangerous person under the Walsh Act. Furthermore, the Fourth Circuit affirmed Mr. Wooden's unconditional release. Relying on their own precedent in *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012), the court defined a lower court ruling as clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (p 462). The Fourth Circuit, after hearing the opposing theories of the case, held that the findings of the district court represented "a permissible and reasonable interpretation of the evidence" (*Wooden*, p 610). The Fourth Circuit agreed that Mr. Wooden now failed to meet the criteria of commitment under the Walsh Act because he lacked "a serious mental illness, abnormality, or disorder" that could serve as the basis for a "serious difficulty in refraining from sexually violent conduct or child molestation if released" (*Wooden*, p 609).

The Fourth Circuit Court agreed with the district court that Mr. Wooden's "age and health issues" reduced the chances of reoffense if he were discharged. The circuit court noted that Mr. Wooden was then 60 years old and that male sex drive declines with age. The circuit court noted that Mr. Wooden "generally used a wheelchair" and planned to live with his sister on release. Mr. Wooden's sister testified concerning the measures she would take to reduce the chances that Mr. Wooden would reoffend.

Dr. Malinek had testified that persons with IDD were more likely to be the victims of sexual abuse. Dr. Malinek further argued that Mr. Wooden's "forward, aggressive" sexual conduct, evident in his early offenses, was not consistent with a diagnosis of IDD. Dr. Malinek also noted that Mr. Wooden had refused to participate in sex-offender treatment at Butner. In their appeal, the government argued that Dr. Malinek's opinions were not adequately considered by the district court. The circuit court disagreed, mentioning that the circuit court had summarized Dr. Malinek's testimony concerning violent crimes and IDD, but had found Dr. Winsman's testimony "to be more persuasive."

Discussion

In *Wooden*, the courts accepted a reformulation of a sex offender's case, in which the offender's prior misconduct was attributed to cognitive deficits and emotional immaturity rather than pedophilia. In essence, the defense argued that the prior sex crimes against children were secondary rather than primary. The experts for the defense argued that Mr. Wooden's immaturity and not a specifically pedophilic arousal pattern was responsible for his misconduct toward children. Necessary to this theory was the idea that, if the cause of the original misconduct was immaturity, the offender could progress out of said immaturity; otherwise the risk may not sufficiently diminish over time to allow a reasonably reliable recommendation that the offender's risk was now low enough to safely allow community placement. Interestingly, if a court accepts a defense's case theory that the etiology for the sexual misconduct is cognitive immaturity, and not the "abnormality" of pedophilic arousal, then a risk assessment would not be required because the "but for" first prong of the civil commitment statute would have then been eliminated. Because the authors of legislation such as the Walsh Act are probably not that concerned about the etiologic determinants of sexual misconduct against minors, revisions of such legislation may be in the offing.

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Court Rules on Acceptable Use of Professional Titles in Political Campaigns

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The Fifth Circuit Court of Appeals Considers whether Potentially Misleading Use of Professional Titles in a Political Campaign Merits Constitutional Protection

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In *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016), Dr. Mary Louise Serafine filed an appeal after