

the expert testimony presented by Mr. Shea's witnesses. The court found the proposed conditions of release to be appropriate and not necessarily permanent. The court formally entered its order on September 13, 2019, and Mr. Shea appealed the decision, contending that the court erred in finding that his discharge should be subject to conditions, claiming that he was "no longer sexually dangerous" as supported by the testimony of his expert witnesses.

Ruling and Reasoning

The Fourth Circuit Court of Appeals affirmed the district court's ruling. The appellate court examined the standards of review for weighing competing expert opinions. Expert opinion is not fact that can be found as true or false; rather, it is the role of the district court's factfinding, whether by judge or jury, to find the ultimate facts. Given the district court's advantage in hearing and weighing evidence, the appellate court deferred to the district court's factfinding, and those findings were subject to appellate review under the clear error standard. Relying on the precedent in *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012), the court defined a lower court ruling as clearly erroneous when the appellate court is "left with the definite and firm conviction that a mistake has been committed" (*Hall*, p 462). The appellate court also noted that, in reviewing under the clear error standard, it can consider whether the factfinder abused its discretion in favoring one expert opinion over another. If an appellate court finds such abuse, it can conclude that the ensuing factual finding was clearly erroneous. The factfinder cannot conclude that an expert opinion is true or false. Rather, it must determine the weight to give the opinion by considering whether it is "plausible, coherent, and internally consistent" (*United States v. Wooden*, 887 F.3d 591 (4th Cir. 2018), p 603), and "not contradicted by extrinsic evidence" (*United States v. Caporale*, 701 F.3d 128 (4th Cir. 2012), p 142).

The Fourth Circuit, after reviewing the expert testimony presented by Mr. Shea's expert witnesses and the government's expert witnesses, ruled that the district court did not abuse its discretion in finding the opinions of the government's expert witnesses more compelling. The court also noted that the government's experts' testimony better responded to Mr.

Shea's demonstrated conduct and circumstances than did Mr. Shea's experts' opinions. Therefore, the Fourth Circuit concluded that the district court did not abuse its discretion in favoring the government's expert testimony over Mr. Shea's expert testimony and the district court's finding based on those opinions was not clearly erroneous.

Discussion

The decision in *United States v. Shea* highlights the importance of the factfinder's discretion in determining the weight of expert testimony once it has been admitted as relevant and reliable. If the expert testimony is plausible, coherent, internally consistent, and not contradicted by extrinsic evidence, the weight of the expert opinion is at the discretion of the factfinder and can only be rejected upon appeal if it is found to be clearly erroneous, that is, when the appellate court is "left with the definite and firm conviction that a mistake has been committed" (*Hall*, p 462).

Another important piece to consider about this case is that it involved the release of a civilly committed sexually dangerous individual under the Adam Walsh Act. This situation presents a complex set of concerns regarding psychiatric diagnoses, risk assessment, and volitional impairment. The factfinder relies on the expert testimony to help understand and decide on these concerns to adequately serve the safety interests of the public and to facilitate the treatment of sexually dangerous persons and, thus, provide them a path to good citizenship.

Private Entities as State Actors in Civil Commitment Procedure

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Ninth Circuit Rules That a Private Hospital Acted under the Color of State Law and Potentially Violated a Man's Fourth and Fourteenth Amendment Rights

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Key words: 1983 Claims; involuntary commitment; involuntary treatment; 14th Amendment; civil liability

In *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742 (9th Cir. 2020), Kenneth Rawson appealed a district court decision that dismissed his constitutional claims under 42 U.S.C. § 1983 (1996) after the district court concluded that the defendants were not acting under the color of state law. Mr. Rawson alleged that Recovery Innovations, Inc., a private nonprofit hospital, violated his Fourth and Fourteenth Amendment rights when they physically and wrongfully detained him, forcibly administered injectable antipsychotic medications, and misled a court into an extended involuntary commitment lasting fifty-five days. The Ninth Circuit reversed and remanded the decision.

Facts of the Case

In Clark County, Washington on March 4, 2015, Kenneth Rawson allegedly made statements regarding automatic weapons and mass murder to a bank teller. When Mr. Rawson returned to the bank later that day, staff notified authorities who arrived and took Mr. Rawson into custody. Because of sheriff deputies' concerns that Mr. Rawson may have been experiencing a mental health crisis, he was transported to an area hospital where he was evaluated and placed on a 72-hour involuntary mental health hold in accordance with Washington's Involuntary Treatment Act (ITA) (Wash. Rev. Code § 71.05.153 (2011)). For his involuntary treatment, the County Designated Mental Health Professionals arranged for him to be transported to Recovery Innovations, Inc.'s (RII) nearby Lakewood facility. Notably, RII is a private nonprofit corporation that leased space on the grounds of Western State Hospital, one of Washington State's primary state psychiatric facilities. RII leased its Lakewood treatment facility property directly from the State of Washington.

Following transfer to RII, the RII treatment staff petitioned for an additional fourteen days of involuntary treatment on the grounds of grave disability and

serious harm to others. A court heard and granted this petition. While at RII, Mr. Rawson was treated with involuntary, forced injection of antipsychotic medication. Mr. Rawson claimed that he had no mental illness, required no treatment, and did not have suicidal or homicidal ideations. But, the treating psychiatrist petitioned for a further 90 days of treatment, stating that Mr. Rawson had "threatened, attempted, or inflicted physical harm" (*Rawson*, p 746), which required further involuntary commitment in accordance with Washington's ITA. Later information obtained from RII staff indicated that Mr. Rawson had, in fact, made no threatening statements.

To challenge the petition for further involuntary treatment, Mr. Rawson requested a jury trial. This proceeding was continued multiple times. During this period, Mr. Rawson remained involuntarily committed, and RII staff communicated regularly with the assigned Deputy Prosecuting Attorney regarding the strength of the hospital's case against Mr. Rawson, legal strategies, and disposition options. While Mr. Rawson awaited trial, a court-appointed expert psychiatrist evaluated him and found that Mr. Rawson was not dangerous and that he had no ongoing symptoms of a psychotic or mood disorder. On April 29, 2015, Mr. Rawson was finally released following an attorney-negotiated agreement. Upon release, Mr. Rawson filed suit against RII pursuant to 42 U.S.C. § 1983, claiming that RII staff members violated his Fourth and Fourteenth Amendment rights.

The district granted summary judgment for defendants and dismissed Mr. Rawson's claims. It stated that RII staff were not acting under the color of state law and, as a result, could not be held liable for violating Mr. Rawson's constitutional rights under § 1983. The district court found that Mr. Rawson did not establish "that involuntary commitments [were] both traditionally and exclusively governmental" and that there was no "government involvement sufficient to override the purely medical judgment of the private individual" (*Rawson*, p 746). For these reasons, according to the lower court, the defendants were not acting under the color of state law. Mr. Rawson appealed.

Ruling and Reasoning

In *Rawson*, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the district

court's summary dismissal of Mr. Rawson's claims. The panel concluded that the defendants did, in fact, operate under the color of state law regarding the actions for which Mr. Rawson sought to hold them liable. In reaching this determination, the Court of Appeals noted that, in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the determination of whether a private person or corporation operates under the color of state law "is a matter of normative judgment, and the criteria lack rigid simplicity. . . . No one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient" (p 295-6). The court turned to four possible general tests for such a question as laid out in *Kirtley v. Rainey*, 326 F.3d 1088 (9th Cir. 2003): "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus. . . . Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists" (p 1092).

Citing *West v. Atkins*, 487 U.S. 42 (1988), the Ninth Circuit first acknowledged that "private parties may act under color of state law when they exercise powers traditionally held by the state" (*Rawson*, p 751). In essence, RII's deprivation of Mr. Rawson's liberty during his extended period of involuntary commitment was, in some sense, caused by the state's exercise of its police and *parens patriae* powers as first articulated in *Addington v. Texas*, 441 U.S. 418 (1979). As in *West*, RII was acting with the "authority of state law" when it sought further involuntary commitment past the initial 72-hour emergent evaluation. Furthermore, the court underscored the Fourteenth Amendment duties of the state to afford due process to persons involuntarily committed. With RII seeking to uphold those duties, they became further entangled with state function.

Next, the court pointed to the extensive involvement of the Deputy District Attorney as evidence of significant influence by the state in the decisions made by RII staff. This included evidence that the prosecutor altered Mr. Rawson's diagnosis when conflicting evidence was gathered. This showed further enmeshment between RII and the state. Then, the court recognized that private parties can act under the color of state law when either the state authorized or approved those actions (as in *Jackson v.*

Metropolitan Edison Company, 419 U.S. 345 (1974)) or "affirmatively commanded" those actions via state protocols (as in *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982)). In *Rawson*, RII's actions received clear state imprimatur via direct approval of the additional fourteen-day petition and the affirmative requirement to provide treatment without informed consent. Last, the court pointed out that RII's facility was leased directly from Western State Hospital whose grounds were clearly marked and historically recognizable as a state facility.

As a result, the Ninth Circuit determined that the actions undertaken by RII were under the color of state law due to satisfaction of the tests laid out in *Kirtley*. They cited opinions given in *Jackson* and *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000), that "a sufficiently close nexus between the state and the private actor" existed "so that the action of the latter may be fairly treated as that of the State itself" (*Jensen*, p 575). The court reversed the district court's ruling and remanded for further proceedings.

Discussion

The work of correctional and forensic psychiatry often occurs within physically restrictive environments, without truly informed consent, and through court-ordered involuntary commitment and treatment. Psychiatrists who operate privately or within private contracting corporations do so alongside city, county, and state correctional and governmental officials which can complicate the psychiatrist's treatment role. Treatment decisions made with well-intended professional judgment in these settings are not necessarily shielded from liability of civil rights violations under § 1983. Consequently, careful consideration of possible civil rights violations should remain at the forefront of the correctional and forensic psychiatrist's practice.

As in *Rawson*, interactions between medical staff and attorneys or the physical location of the treatment facility itself can become significant when determining whether one's actions fall under the color of state law. But no single test or set of circumstances is wholly sufficient to make this determination. Ultimately, the unique practice environment of forensic psychiatry allows for clinically needed and meaningful work while also widening a potential for serious civil rights violations, given reduced

treatment avenues for the patient and the restrictive power of a state that is so deeply involved in civil commitment and correctional care.

Cross-Examination and Witness Bias in Attempted First Degree Murder

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Exclusion of Defense-Proffered Evidence of Witness Bias Violated Defendant's Sixth Amendment Rights

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Key words: cross examination; bias; Sixth Amendment; confrontation clause

In *State v. Orn*, 482 P.3d 913 (Wash. 2021), the Washington Supreme Court considered whether a defendant's constitutional right to confrontation of a witness and to present a complete defense had been violated. The court held that the trial court's decision to exclude evidence that the state's key witness worked as a confidential informant for the police department involved in prosecuting Nicholas Orn's case was an abuse of discretion and violated Mr. Orn's constitutional rights. But it affirmed the previous intermediate appellate court's decision to uphold the finding of the trial court after determining beyond a reasonable doubt that the error was harmless.

Facts of the Case

On August 2, 2016, Nicholas Orn shot Thomas Seamans eleven times with a .22 rifle, following a disagreement and conflict about Mr. Orn's personal

property stored in Mr. Seamans garage, where he was living. Following the shooting, Mr. Orn admitted to his ex-girlfriend that he had shot Mr. Seamans. A neighbor called 911, and officers from the Kent Police Department (KPD) arrived and arrested Mr. Orn at the scene. At trial, Mr. Orn's lawyer acknowledged that Mr. Orn had fired the shots but argued that they were in self-defense.

Mr. Seamans survived the shooting. In December 2016, he was investigated by the Kirkland Police Department for unrelated charges of felony theft and identity theft. Kent Police subsequently contacted Mr. Seamans and offered that if he worked as a confidential informant for them, his Kirkland felony charges would not be forwarded to the Prosecuting Attorney's Office. Mr. Seamans accepted and signed a written agreement.

At Mr. Orn's trial, the court granted the state's motion *in limine* to exclude the informant agreement and prevent Mr. Orn from asking Mr. Seamans any questions about it, "determining that the evidence's probative value was substantially outweighed by unfair prejudice or confusion of issues," (*Orn*, p 919). The only question defense counsel could ask was, "[I]sn't it true that since this incident, you have actually worked with Kent Police Department?" to which Mr. Seamans responded, "Yes" (*Orn*, p 921).

Mr. Orn was convicted of attempted first-degree murder with a firearm enhancement. He appealed, arguing that the exclusion of evidence about the informant agreement violated his Sixth Amendment rights to present a defense and to cross-examine adverse witnesses. He also argued there was an error in the trial court's jury instruction regarding the elements of attempted first-degree murder. The Court of Appeals rejected both of Mr. Orn's arguments and affirmed. Mr. Orn petitioned the state supreme court for review.

Ruling and Reasoning

The Washington Supreme Court affirmed Mr. Orn's conviction in a unanimous decision. Though it ruled that the trial court had erred and had violated Mr. Orn's Sixth Amendment rights by preventing him from exposing possible bias via cross-examining Mr. Seamans on the details of the confidential informant agreement, it also determined beyond a reasonable doubt that the error was harmless.

In its reasoning, the court explained that revealing a witness' bias can expose the motivation to testify,